THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

PC. CIVIL APPEAL NO.35 OF 2020

(From Matrimonial Cause No.03 0f 2020 Kilwa Masoko Distric Court, Original Matrimonial Cause No. 01 of 2020)

SOFIA OMARI SAIDI ..... APPELLANT

VERSUS

BAKIRI ABDILLAH CHIKUYU ..... RESPONDENT

Date of last order: 28/09/2021
Date of Judgment: 25/10/2021

JUDGMENT

MURUKE, J.

Bakiri Abdillah Chikuyu, filed matrimonial dispute at Kivinje Primary Court at Kilwa, petitioning for divorce and distribution of matrimonial properties. Trial court awarded respondent 75 % share of all of matrimonial properties and other properties allocated at Lindi, while 25 % of the remaining matrimonial properties awarded to the appellant. Dissatisfied with that decision, Appellant filed matrimonial appeal No. 03 of 2020 at Kilwa Masoko District Court in which the first appellate court upheld the decision of the trial court. Same dissatisfied, appellant thus filed present appeal raising five grounds as follows;

1. That the trial court erred in law and fact to determine and decide the matter while I am m not a legal wife of the respondent and we had never lived under one roof.

2. That the trial court erred in law and facts to determine this matter based on the evidence of SM2, SM3, SM4, SM5, SM6 and SM7 who they are neither my mother or my brother.

3. That the trial court and appellate court erred in law and fact by recording my evidence contrary to what I testified during the hearing.

4. That the trial court erred in law fact by including the disputed house as a matrimonial house, while the construction of the disputed house was not constructed through joint efforts.

5. That the trial court and first appellate court erred in law and facts to believe uncorroborated evidences of the respondent that he has properties at Lindi which according to him the properties being used by appellant's family while not.

On the date set for hearing both appellant and respondent appeared in persons. Thus, argued their case orally. In her submission appellant argued that, respondent was not his husband, they were only business partners, that were dividing profits. She was the one in control of business, the profit she got joined Vikoba. After sometimes she bought one plot. Then she stated construction of the house, the house was built by Mwichande who later became her husband. After finishing construction, of 4 rooms house with 2 verandah, she then moved in with her children. After 6 months she was issued with summons for divorce and division of matrimonial asserts. She maintained that; respondent was not her husband. Trial court and district court both erred in deciding that they were husband and wife. She had one son before the present one with Mwichande who has 4 children with other two wives. She was third wife to Mwichande. She concluded by

asking this court to pronounce that, respondent has never been her husband. The house where she is living at Milamba Village, Kilwa Kivinje be declared as her property.

In reply, respondent argued that, the house in dispute, is the property of the marriage. He opened business and asked appellant to run the same, and built appellant parent's house. Appellant asked Mwichande to be person overseeing the construction. Later, he became the husband of appellant while she is still his wife. He had another wife married under Islamic principles. She convinced appellant to officiate marriage but she was delaying. He paid 250,000 as dowery. He constructed house of 4 room and 2 verandah. Appellant is still doing business in his place. All properties were acquired during their six years living together are their joint properties. Even the child she is saying is of Mwichande at first at clinic he was written as father, after 7 months pregnancy appellant revealed affairs with Mwichande, then changed the father of the child, to be Mwichande.

Respondent argued further that appellant came from Dar es salaam with one bed, which they gave their parents. Everything they acquired he is the one who bought. He bought iron sheets, 2 million, all material for covering the house, bricks, and cement. In business area the area is built by woods. The appellant is the one doing business at the area. She is holding everything. He rested his submission by asked this court to dismiss this appeal, and upheld decision of two courts bellow, because, he has invested heavely believing appellant to be her wife.

Having heard both parties' submission on grounds of appeal and gone through records of trial court and first appellate court, there are two issues to be determined.

1. Whether there is presumption of marriage.
2. Whether the matrimonial properties are properly divided.

It is a settled law that, if a man and women cohabited for at least for two years, their relationship attain a reputation of rebuttable presumption. This position of the law is well settled under section 160(1) of the Law of Marriage Act, Cap 29 R.E 2019, which provides as follows;

> *"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".*

This position was also discussed in the case of **Hidaya Ally Vs. Amiri Mlugu, Civil Appeal No. 105 of 2008 CAT** (unreported), at Dar es salaam, where it was stated that;

> *"To begin with, we agree with the High Court that there was no any formal marriage between the appellant and the respondent. We also stress, as did that court, that the admission of the parties that they had cohabited for at least two years brought their relationship within the purview of section 160(1) of the LMA, entailing that there was a rebutted presumption of marriage, and that they rebutted that presumption by adducing evidence that they not dully married."*

It is on the record that, both appellant and respondent they have cohabited for more than two years. The evidence of PW1(Bakiri Abdallah Chikuyu) at page 3 of the typed proceeding was as follows;

> **"Anaomba kuvunja mahusiano na ndoa na mdaiwa, 2013 tulikutana kwa dada yake mdaiwa, niliongea nae kuwa nataka kumwoa mdaiwa tulifanya makubaliano ya mahusiano."**

To prove that appellant and respondent lived as wife and husband, SM2 Shamila Kalinosa Chamkweo, appellant mother testified at page 7 of trial court typed proceedings that,

> **"SU1 ni mwanangu wa kumzaa mwenyewe. SU1 alichumbia kwa barua na ametoa mahari 250,000 yapata miaka mitano iliyo pita kwa makadirio. SM1 tuna mtambua kama mkwe wetu kwa kuwa alitimiza taratibu zote za ndoa kwa kumchumbia mtoto wetu SU1 na kulipa mahari hadaiwi. Mimi tatizo nilisikia matatizo yao nilimongelea mwanangu na kumkanya lakini aliendelea na tabia zake za kumkataa SM1 baada ya kuwa na mtu mwingine, SM1 alirudi kulalamika kwetu na hatukuweza kafanya usuluhishi kwa kuwa wote walikuwa mbali, SM1 alieleza kuwa nyumbani kwake kuna mgogoro wa ndoa, SU1 anamjibu vibaya, na kuwa yeye sasa hivi haendi kwa SU1 na swala limefikishwa mahakamani na mimi SM1 aliniita mimi kuja kueleza ninalo fahamu.**
>
> **Katika uhusiano wao wa ndoa wa muda wa mrefu waliunda shamba ambalo lipo kwangu na mimi natunza, hilo shamba tunalima tu, baadae wakitaka kuchukua, shamba lina mikorosho za kutosha, tu mimi nilipanda mikorosho na bado tunaendelea kutunza. Pia wadaawa walinijengea nyumba wakati wakiwa Pamoja najua nguvu ilitoka kwa SM1, mimi nime changanyikiwa kuwa uwamuzi wa mwanangu SU1 kutaka kuvunja ndoa wakati SM1 ananitunza."**

The above evidence is from the appellant mother. She explained relationship of the appellant and respondent and properties acquired. This piece of evidence from appellant mother is supported by the testimonies of PW3(Dadi Saidi Omari Matenda) appellant brother at page 9 of the typed proceedings of the trial court as follows;

> **" wadaawa nawafahamu, SU1 ni dada yangu na SM1 ni shemeji yangu niliwahi kusikia matatizo ya ndoa yao ya kutaka kutengana, kwa mdua matatizo hayo niiwahi kuwasuruhisha kwa kukaa nao na baada ya hapo muafaka sahihi haukupatikana, mimi naobma mahakama iwaelekeze wadaawa waelewane ndio jambo bora zaidi kuliko kuvunja ndoa hii.**

Wadaawa walikaa miaka sita na zaidi katika mahusiano yao ya ndoa na SM1 anafahamika nyumbani kwa kuwa mahari alilipa na barua ya uchumba.

Wadaawa walipata mali mbalimbali katika uhusiano wao, wana nyumba ipo hapa Kivinje, na pia walipokuwa pamoja tulishirikiana kuwajengea wazazi banda, huko Lini mimi hoja ya msingi wanataka kuvunja ndoa hii ni ibilisi tu wa dunia kama mwingine ana uhusiano wan je ya ndoa na mtu mwingine anadharaulika lazima kuwe na kutoelewana, mimi ninaweza nikatumia nafasi ya kuwakutanisha basi mahakama ichukue sharia zake, endapo hawajasikiliza."

On the other hand, appellant on her diffence as SU1 replying court clarifications on some of issues she is quoted to have said at page 13 of the trial court.

Mahusiano yetu tulianzia Kilwa, tulikubaliana mahusiano, sijamuliza SU1 kama ana mke, sijawahi kufika kwa SM1 ujenzi tulisimamia wote mimi na SM1, hatukuwa na maandishi yoyote ni mimi na SM1 tunapanga, baada ya kutoka Dar es Salaam, si nilipanga chumba nilihamia biashara faida tulikuwa tunagawana hatukumshirikisha mtu yeyote, tulikuwa sisi tu, SM1 alilipa hela ya mahari 250,000/= wazazi hawakumshawishi SM1 kuwajengea numba ni kwa hairai ya SM1, tuliishi ndani ya ndoa miaka zaidi ya sita (6) ndoa haikukamilika, anajua SM1, mimi sikuwa na mahusiano ya ndoa na mtu mwingine tatizo la huyo kijana alienivamia na kunipiga alikuwa anataka pesa katika biashara vigawanywishwe, mimi sikuwaleta mashahidi walioshuhudia maendeleo yangu. Ushahidi hati ya kiwanja na karatasi ya kununua bati, sikuweza kutunza ushahidi wa kimaandishi wa biashara zetu, pesa nilizompa SM1 hapakuwa na ushahidi wowote wa maandishi kwa kuwa tumepeana ndani na kuwa SM1 ni mumewangu, nilimweka msimamizi wa ujenzi alipoanzia chini hadi kozi 8, mimi huyo msimamizi niliemweka anaitwa Mwichande, nilimshirikisha SM1 kuhusu huyu Mwichande kusimamia ujenzi nae aliridhika, siwezi kuelezea gharama nilizotumia wakati najenga nyumba hivyo, nilikuwa nalipia kodi. Chumba cha kwanza alilipa SM1 ya pili nililipa mimi, wakati wa ujenzi unaendelea makubaliano yalikuwa kwamba nyumba hiyo ni yangu si ya ushirika, hakuna

maandishi yoyote zaidi ya hati ya manunuzi ya kiwanja cha pili pia aliandika jina lake."

Although both appellant and respondent cohabited for more than two years, and the respondent completed all the process of marriage like paying of bride price, they never contracted formal marriage. The trial court findings which were upheld by the first appellate court were to the effects that, respondent have paid bride price, but they have never contracted formal marriage, however, he proceeded to order applicant to be given certificate of divorce under section 107(2) (a) of the LMA. For easy reference part of its judgment is quoted herein under;

> **"Ombi la mdai la kutaka ndoa yao ivunjwe kwa amri ya mahakama na kupewa talaka limethibitishwa na Ushahidi wa mdai, nayo mahakama imekubaliana na mdai kuwa ndoa hiyo haina uhai wa kuendelea tena, nae apewe hati ya talaka chini ya fungu la 107(2)(a) ya sheria ya ndoa ya Tanzania 1971 sura ya 29 R.E 2002] kwa sababu ya ugoni anaoufanya mdaiwa mara kwa mara na mdaiwa kukiri hana pingamizi nalo."**

Looking on these findings, the trial court misdirected itself. To prove if there is marriage either customary, civil or religion, parties must register their marriage to prove that they have contracted marriage as required by section 43(1), (2), (3), (4) and (5) of the law of Marriage Act, Cap 29.R.E 2019. Paying bride price is only early procedure for marriage which cannot be considered as marriage. Parties required to tender their marriage certificate to satisfy the court that they have formal marriage. In the case of **Msangi Hemedi Msangi Vs. Domina Calist, Matrimonial Appeal No. 5 of 2020 HCT** (unreported) at Mwanza, court held that;

> "There is no dispute that the respondent paid the bride price. However, paying the bride price is an early procedure towards marriage, the same cannot prove that a customary marriage was contracted."

On the basis of the above, I find and hold that there is no marriage between the parties to be resolved by trial court. The parties lived under presumption of marriage under section 160(1) of the LMA.

In respect of the second issue whether, the matrimonial asserts are properly divided. Section 160(2) of the law of Marriage Act, stipulates that;

> "(2) when a man and 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 women 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 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"

The quoted section shows that court have power to order division of property once the presumption of marriage is rebutted, just like in dissolution of marriage or separation. In the case of **Hemed S. Tamim Vs. Renata Shayo [1994] T.L. R 197**, it was held that;

> *"Where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under s 160(1) of the Law of marriage Act 1971, the courts have power under s 160(2) of the Act 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."*

So, it is misconception for anyone to think that division of matrimonial property can only be ordered in a valid marriage. However, in considering division of matrimonial properties court have to consider contribution made bay each party. Under section 114(2)(b) of the Law of marriage Act.

(2) in exercising the power conferred by subsection (1), the court shall have regard to-

(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

The section underscores that there must be adequate evidence showing the extent of contribution. It can be in terms of money or any other efforts is made towards the acquisition of the property which is the subject of distribution. In this case, the trial court found that the properties to be considered in division are one house located at Miramba, business frame located at Miramba, one house located at Lindi where respondent's parents resides, one farm located at Lindi, electronic instruments and cash money Tshs 1,000,000/= (one million). As aforesaid, the trial court found that the evidence adduced at the trial court established that the respondent contributed more than the appellant, thus came up to a conclusion of awarding 75% of the share of the whole properties to the respondent and the remaining 25% to the appellant.

I understand that, there is no arithmetic calculation in distributing of matrimonial property. Appellant is the one that is doing business opened by respondent. Todate respondent is not getting anything from the business. House at Lindi constructed for appellant parents is not part of properties to be divided between appellant and respondent. It is on record that respondent built the house for in-laws as correctly supported by the

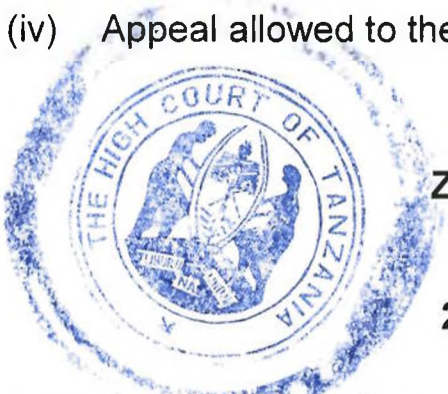
evidence of SM2 appellant mother. It was a gift to respondent in laws that can not be divided. Legally and morally gifts are not recoverable unless it was conditional. There is nothing on records to prove that, such construction of the house by respondent to his in laws was a conditional gift. Thus I differ with two court below on the house at Lindi same is the declared to be property of appellant parents.

(i) For the better end of justice, appellant to get 30% shares of House and business at Miramba Kilwa, while coconut farm at Lindi appellant to get 25% and 75% to the respondent.

(ii) Both House, business place and Lindi farm to be valued, for either of the parties to pay another, or to be sold for each party to get her/his share.

(iii) From the nature of the dispute, each party to bear own costs,

(iv) Appeal allowed to the extent shown.



Z.G. Muruke

Judge

25/10/2021

Judgment delivered in the presence of appellant and Respondent both in persons.

Z.G. Muruke

Judge

25/10/2021