IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

PC MATRIMONIAL NO. 5 OF 2021

SAMSON ZABLON MASIJA ..... APPELLANT

VERSUS

JOYCE SELEMAN KISUNDA ..... RESPONDENT

(Appeal from the decision of the District Court of Musoma at Musoma (Hon. E.G. Rujwahuka-SRM), dated 26th day of February, 2021 in Matrimonial Appeal No. 16 of 2020)

JUDGMENT

17th August and 24th November 2021

KISANYA, J.:

The appellant, Samson Zablon Masija petitioned for his divorce and custody of children at the Musoma Urban Primary Court. It was adduced by both parties that the appellant and the respondent, Joyce Seleman Kisunda had lived together as husband and wife from 2011 to 2017, when the latter left the appellant's house. It was also not disputed that, during that period, the parties were blessed with three children. As of 2020, the said children were aged 4, 6 and 8 years.

The trial court was satisfied that, there was no formal marriage between the parties and that, a presumption of marriage had not been established.

Nevertheless, the custody of children was awarded to the appellant. The respondent was given the right to visit and see the said children.

Aggrieved, the respondent appealed to the District Court of Musoma at Musoma (first appellate court) in Matrimonial Appeal No. 16 of 2020. She raised nine grounds of appeal which can be merged into six complaints as follows; One, the trial court had no jurisdiction to determine matrimonial proceedings based on a presumption of marriage. Two, the trial court erred in holding that the presumption of marriage was rebutted. Three, the trial court erred in law and fact in considering extraneous matters. Four, the trial court had no jurisdiction to entertain issue related to maintenance and custody of children. Five, the trial court erred in failing to consider contribution of both spouses to the acquisition of matrimonial assets. Six, the trial court erred in law and facts by failing to give weight on the evidence adduced by the respondent and her witness.

Upon hearing the parties on the respondent's complaints, the first appellate court held the view that the trial court could not have granted the order for divorce or separation as the parties had no formal marriage. It also held that, even if there was a presumption of marriage between the parties, the primary court had no jurisdiction to entertain a matrimonial cause based on presumption of marriage. Yet, the District went on to make the following orders, in verbatim:

1. *The custody of children is placed under custody of the appellant (biological mother), and the appellant is accorded right to visit his children under mutual agreement of both parties.*
2. *The respondent to pay Tshs. 150,000/= per month for maintenance of his children.*
3. *The respondent to provide necessaries such as shelter, food, clothing and medical care.*
4. *The respondent to pay school fees of his children as per section 41 of the Law of the Child Act [Cap 13 RE 2019]. And three children to proceed to school where they schooled till now. Those orders No. 1, 2, 3 and 4 to be execute (sic) immediately, and failure to do not (sic) act accordingly, the respondent could (sic) be charge (sic) and convicted under section 14 of the Law of the Child Act [Cap 13 RE 2019] for violation of the right of the child under section 7 and 8 of the Law of the Child Act [Cap 13 RE 2019].*
5. *That the respondent shall pay Tshs 3,000,000 as dowry to the parents of the appellant as remedy to the appellant for delivering three children with the respondent. And the payment of those (sic) dowry of Tshs. 3,000,000/= is hereby calculated at Tshs 1,000,000 to each child for heads (sic) of cattle as one head of cattle valued at Tshs. 500,000/=. This is according to the Customary Law. This order for paying dowry to be executed in order to vacate the Court's order dated on 16.12.2021 (sic) concerning the restriction to the respondent to marry another wife for marriage celebration. Therefore, the respondent after being paid the dowry of Tshs. 3,000,000= to the parents of the appellant, this Court would vacate its Order dated 16/12/2020 for restriction to the respondent to marry another wife failure of it, this Court Order dated*

16.12.2021 (sic) for restricted (sic) to the respondent to marry another wife for any marriage celebration would sustain until paid.

6. *Costs to fall (sic) the invents (sic).*

The appellant sought to challenge the decision of the first appellate court on the following grounds:

1. *That, the 1st Appellate court erred in law and fact for issuing orders on new matters raised suo moto by court without affording the right to be heard to the parties.*
2. *That, the 1st Appellant court erred in law and in fact for stating that the trial court had no jurisdiction and going on determining the matter contrary to the law.*
3. *That, the 1st Appellant court erred in law and fact for determining the appeal on merit while it noted the social welfare officer was not involved in the trial court on the matter related to children.*
4. *That, the 1st Appellate court erred in law and fact for ordering Appellant to pay 150,000/= as child maintenance without considering income capacity of the Appellant.*
5. *That, the 1st Appellate court erred in law and fact for restraining appellant to marry another wife, while there is no marriage which subsists between Appellant and Respondent.*
6. *That, the 1st Appellate court erred in law and fact for ordering custody of children to the Respondent on ignoring the fact that the Respondent abandoned children for three years.*
7. *That, the 1st Appellate court erred in law and fact for not considering that the Appellant managed to raise children for three years alone.*

8. *That, the 1st Appellate court erred in law and fact for ordering the Appellant to pay 3,000,000 as dowry to the parent of the respondent while there no marriage which subsists between Appellant and Respondent.*

At the hearing of this appeal, the appellant was represented by Mr. Noah Mwakisisile, learned advocate while, the respondent appeared in person.

In his submission in support of the first, fourth and eighth grounds, Mr. Mwakisisile argued that the 1st appellate court raised and decided on the issues related to payment of dowry, maintenance of children and restricting the appellant to get married without according the parties the right to be heard. Citing the case of **Hai District Council and Another vs Kitempu Kinoka Laizer,** Civil Appeal No. 110 of 2018 (unreported), Mr. Mwakisisile urged me to nullify the decision of the District Court.

Submitting on the second ground of appeal, the learned advocate argued that the first appellate court erred in holding that the primary court had no jurisdiction to entertain the matter before it. He argued further that, even if it is considered that the trial court had no jurisdiction to entertain the matter, the first appellate court was not required to entertain the appeal and issue the above orders. Referring to the case of **Ramadhan Omary Mtiula vs R**, Criminal Appeal No. 62 of 2019, the learned counsel argued that the first appellate court ought to have nullified the proceedings and judgment of the trial court.

On the third ground of appeal, Mr. Mwakisisle argued that the first appellate court erred in holding that the trial court did not engage a social welfare officer on the issue related to custody of children.

Submitting on the fifth ground of appeal, the learned counsel argued that the first appellate court erred in restraining the appellant to get married while it was satisfied that the parties had no formal marriage. However, the learned counsel submitted that the marriage between the parties was based on a presumption of marriage after living together for more than two years.

On the sixth and seventh grounds, Mr. Mwakisisile submitted that the first appellate court erred in placing the custody of the children to the respondent who had deserted them. Referring to section 125 of the Law of Marriage Act [Cap. 29, R.E. 2019] (the LMA), he was of the view that, the best interest of the children was for the children to be under custody of the appellant and not the respondent.

Basing on the above submission, the Court was moved to quash and set aside the decision of the first appellate court.

Replying to the appellant's counsel submission, the respondent contended that the appellant petitioned for a divorce at the time when he had married another woman. Regarding the issue of dowry, the respondent submitted that it

was discussed before the first appellate court. The respondent admitted that her marriage with the appellant was based on a presumption of marriage. Being a lay person, she had nothing to submit on whether the primary court had jurisdiction to try the matter before it. However, she asked this Court to uphold the first appellate court's decision on the custody and maintenance of children.

Having gone through the record, the grounds of appeal and the submission made by the appellant's counsel and the respondent, the main issue is whether the appeal is meritorious or otherwise.

I prefer to start with the second ground. The first limb of this ground gives rise to the issue whether the trial court had jurisdiction to entertain the matter. It is pertinent to note here that, the trial court held that there was no presumption of marriage between the parties. Reading from the evidence on record, I agree with Mr. Mwakisisile and the first appellate court held that there was a presumption of marriage between the parties. The evidence to prove that fact was adduced by Yohana Masano (PW2), Magesa Sanila (PW3) and Sauda Kisunda (DW2). Their evidence suggests that the appellant and respondent had lived together as husband and wife from 2011 to 2017. The fact that the said witnesses were close relatives to the parties is by itself not sufficient to disregard they (parties) had lived together for almost six years and considered as husband and wife. Having considered the provision of section 160 (1) of the LMA, I am at

one with first appellate court that the trial courts erred in holding that there was no presumption of marriage between the parties.

There comes the issue whether the trial court had no jurisdiction to try a matrimonial cause which arose from the presumption of marriage. Upon considering the cases of **Wilson Andrew vs Stanley John Lugwisha and Another**, Civil Appeal No. 226 of 2017 (unreported) and **Jummane Jingi vs Njoka Kiduda** (1984) TLR 54, the learned Senior Resident Magistrate held as follows on the issue under consideration:-

> *"Consequently,...the trial Court to this appeal has no jurisdiction to entertain the matter contains a presumption under section 160 of the LMA."*

Reading from the cases relied upon by the first appellate court, I agree with Mr. Mwakisisile that the decisions thereto are relevant only for an action for damages for adultery. See for instance, **Wilson Andrew** (supra) when the Court of Appeal held as follows:

> *"Though with different reasons, we uphold the decision of the High Court as we are satisfied that in the circumstances of this matter, the primary court had no jurisdiction to entertain a claim of damages for adultery."*

In the present case, the appellant did not claim damages for adultery. He petitioned for divorce and custody of children. In terms of section 76 of the LMA,

the primary court is vested with the jurisdiction to entertain matrimonial proceedings. However, the law is settled that, a presumption of marriage is not in itself a formal marriage. Therefore, it is not capable of being dissolved under section 107 of the LMA. This stance was taken by the Court of Appeal in **Hidaya Ally vs Amiri Mlugu**, Civil Appeal No. 105 of 2018 (tanzlii). That being the case, the appellant's prayer for divorce was misconceived. As such, I find no reason to fault the first appellate court on that matter.

Regarding the second prayer on the custody of children, it is provided for under section 160(2) of the LMA that, upon being satisfied that there is a rebuttable presumption of marriage, the courts have power to make consequential orders as in the dissolution of marriage. This position was stated by the Court of Appeal in the case of **Hemed S.Tamim vs Renata Mashayo** [1994] TLR 197 where it was held:-

> *"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 the 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."*

As stated herein, there was a rebuttable presumption that the appellant and respondent had lived together as husband and wife for almost six years. Therefore, an order for the custody of children is one of the consequential orders granted by the courts in dissolution of marriage. Pursuant to section 3 of the LMA, the matrimonial proceedings include, custody of children because it falls under Part VI of that Act. And in view of section 76 of the LMA, the original jurisdiction in matrimonial proceedings is vested concurrently in the High Court, a court of resident magistrate, a district court and a primary court.

On the foregoing reasons, I find merit in the first limb of the second ground of appeal and hold that, the first appellate erred in holding that the trial court had no jurisdiction to determine the matter which led to this appeal.

This brings us to the sixth and seventh grounds of appeal. The appellant faults the first appellate court for awarding custody of the children to the respondent. As rightly argued by Mwakisisile and held by the first appellate court, the law is settled that, in deciding on custody of the child, the paramount consideration by the court is the welfare of the child. This is pursuant to section 125 of the LMA. There is a list of authorities on that stance, one of them being the case of **Celestine Kilala and Another vs Restituta Celestine Kilala** [1980] TLR 76. There is also a rebuttable presumption that custody of a child below the age of seven years is better placed with the mother based on the

welfare of the child principle. Therefore, in terms of section 125 (3) of the LMA, the court is required to consider the undesirability of disturbing the life of an infant by changes of custody.

It is common ground that, when the respondent left the appellant's house in 2017, she took with her all children. However, the appellant relocated her. He then started to live with all children from 2017. The relevant parts of the appellant's evidence is reproduced hereunder:

> *"Niliamua kuondoka na watoto wawili ambao walikuwa tayari amewakatisha masomo...*
>
> *...mimi niliendelea na matunzo ya mtoto mdogo aliyekuwa akiishi naye.*
>
> *4/10/2017 mdaiwa alinipigia simu na kuniomba nikachukue mtoto kwa kuwa anataka kwenda Mwanza.*
>
> *Nilimsihi sana asiondoke hadi nitakapoenda kumuona. Lakini aliamua kuondoka.*
>
> *Jioni yake nilienda kumchukua mtoto ambaye alikuwa na hali mbaya sana ikiwemo kunyweshwa pombe za kienyeji.*

That evidence was not challenged by the respondent during cross-examination or her evidence in chief. In the result, the respondent is taken to have admitted the evidence adduced by the appellant. See also the case of **Bakari Abdallah Masudi vs. R**, Criminal Appeal No. 126 of 2017 when the Court of Appeal held:

"It is now settled law in this jurisdiction that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect."

Apart from the appellant's evidence, one of the children, aged 8 years appeared before the trial court and stated as follows:

"Mimi napenda kuishi na mama kwa sababu sijaonana naye siku nyingi. Lakini pia nampenda Baba kwa sababu ananipenda na ananisomesha mimi na wadogo zangu."

In the light of the above evidence, I agree with the trial court that the welfare of all children was to be taken care by placing their custody to the appellant. The first appellant court's consideration that the social welfare was not involved was misconceived. The provisions of section 99(1) of the Law of the Child Act relied upon by the first appellate court in arriving at that decision applies on the matter before the Juvenile Court. It is also my considered view that, the order issued by the trial court was not to last forever. The respondent was at liberty to petition for custody and maintenance of any child under the Law of the Child Act if there were circumstances affecting the welfare of any child.

In view thereof, the first appellate court erred in making the order for custody of children in favor of the respondent. Thus, the sixth and seven grounds are found to be meritorious.

Next on consideration are the first, fourth, fifth and eight grounds of appeal. It is my considered view that the said grounds can be jointly tacked by considering whether the parties were heard in respect of the orders for maintenance of children, payment of dowry and restricting the appellant to get married before payment of dowry. The right to be heard is provided for under Article 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977 (as amended). The law is also settled that, any decision based on the proceedings conducted in violation of the right to be heard is a nullity. See the case of **Abbas Sherally and Another vs. Abdul S. H. M. Faza Iboy**, Civil Application No. 33 of 2002 (unreported) where it was held that: -

> *The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified****, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "[Emphasis added].*

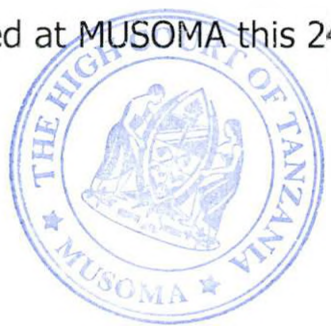
As indicated earlier, the first appellate court ordered the appellant to pay respondent Tshs. 150,000 per month as maintenance of three children. The appellant was also ordered to pay the respondent's parents, Tshs. 3,000,000 as a dowry and remedy to the respondent for delivering three children. Further to

that, the appellant was restricted to get married until the dowry is duly paid to the respondent's parents.

Reading from the record, I find merit in Mr. Mwakisisile's argument that, parties were not heard on the issues of maintenance of children, dowry and restriction to get married before paying the dowry. As if that was not enough, those issues did not stem from the decision of the trial court. In view of the settled law, the said orders are a nullity and cannot be allowed to stand.

For the reasons I have endeavored to state, the appeal is found to be meritorious. In consequence, the judgment of the first appellate court is hereby quashed and set aside while, the decision of the trial court of awarding the custody of children to the appellant is restored. However, if need arises, the respondent is at liberty to petition for custody and maintenance of the children under the Law of the Child Act (supra). This being a matrimonial matter, I order each party to bear its own costs.

Dated at MUSOMA this 24th day of November, 2021.



E. S. Kisanya
JUDGE

Court: Judgment delivered through teleconference this 24th day of November, 2021 in appearance of Mr. Ostack Mligo learned advocate for the appellant and the respondent in person. B/C Jovian present.

Right of appeal explained.

E. S. Kisanya
JUDGE
24/11/2021