

IN THE HIGH COURT OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

MATRIMONIAL APPEAL NO.3 OF 2021

(Original matrimonial Appeal No.3 of 2021, at Mbinga District Court which arose from matrimonial Cause No.1 of 2021 at Kigonsera Primary Court)

FRANCE MITI APPELLANT

VERSUS

MARY MWINGIRA RESPONDENT

JUDGMENT

Date of Last Order: 11/11/2021

Date of Judgment: 30/11/2021

BEFORE: S.C. MOSHI, J

This is a second appeal. Brief facts of the case, the respondent filed a matrimonial cause at Kigonsera Primary court where he sued for division of jointly acquired properties between her and the respondent, the properties were worth Tsh.9,833,000/=. It is common ground that, the appellant and respondent had cohabited for fifteen years, that is from 2005 to

2020. The society surrounding them recognized them as husband and wife. They acquired several properties at the time of their cohabitation; they include a plot of land at Kiwombi village, which bears appellant's name on which they build a house, a motorcycle, and a grocery store. After a full trial the trial magistrate found that the parties had not contracted formal marriage, rather they lived under presumption of marriage. The court found that they were entitled to have their jointly acquired properties divided between them. Thereafter the trial magistrate proceeded to divide the jointly acquired properties as follows, and I quote: -

- a) Wadaawa wagawane kreti tupu za Bia 86 na kret tupu za soda 22 kwa usawa.*
- b) Mali nyingine zote zibaki kwa mdaiwa*
- c) Mdaiwa amipe mdai fidia ya Tsh.3,000,000/=*

The appellant was aggrieved by the decision of the trial court, he unsuccessfully appealed to Mbinga District Court, still aggrieved he preferred his appeal to this court with one ground that: -

1. That the first appellate court erred in law and fact by dismissing the appeal with the grounds which had merit.

During the hearing of the appeal the applicant was represented by Mr. Dickson Ndunguru, advocate who was assisted by Mr. Denis Lazaro, advocate whereas the respondent appeared in person.

Mr. Ndunguru submitted among other things that, the trial court erred in law for making an order for division of matrimonial properties without an order for divorce or separation. He cited section 160(1), (2) of the Law of Marriage Act, Cap 29 R.E 2019, (hereinafter the Act) which provides for rebuttable presumption of marriage. He said that the court may order separation and divorce before ordering other relief, to back up his argument he cited the case of **Richard Majenga v. Sepecioza Sylivester**, civil Appeal No.208/2018, CAT, at TABORA (Unreported).

He further argued that, the trial court erred in law and in fact to award three million basing on the evidence that comes from the court instead of the parties, the counsel argued that,

there is no concrete evidence in the trial court proceedings to support the order. The evidence shows that the parties did not acquire any matrimonial property, but the trial magistrate ordered a compensation which was not a share of matrimonial property.

It was Mr. Ndunguru's submission that, the trial court erred in law and fact by failure to consider the amount which was squandered by the respondent to be part of matrimonial assets or shares in division of jointly acquired properties. He further submitted that, if the court were to consider the evidence it would have realized that the respondent misused the matrimonial properties, hence she was entitled to nothing, in this respect he cited the case of **Bi Hawa Mohamed v. Ally Seif** (1983) TLR.32, finally prayed this court to allow the appeal and quash the decision of the trial court and first appellate court.

In reply the respondent argued that, she cohabited with the appellant for over 15 years and they did not contract a formal marriage, they were not blessed with any child, and that the

appellant has all the document in relation to farm and motorcycle which they acquired together; she stated further that she did not misuse the money, and if there were such misappropriation the appellant was supposed to take necessary steps. She insisted that the trial court awarded her three million, which was compensation for her contribution towards the acquisition of the alleged properties.

After going through the arguments by the parties, the issue to be determined is whether this appeal has merits.

The fundamental question is whether there was a legal requirement for the trial court to issue an order for separation or divorce before embarking into division of joint acquired property between the parties, who lived under the presumption of marriage. Section 160(1)(2) of the Law of Marriage Act, Cap. 29, R.E 2019, reads thus: -

160.-(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.

Considering the above provision, it is quite clear that the court is empowered to make orders for division of matrimonial

properties, subsequent to the grant of decree of separation or divorce. Where there is a presumption of marriage, the court must go further to determine the presumption of marriage whether the same is rebuttable or not, after such determination, the parties are only entitled to apply for division of properties jointly acquired, custody of children and maintenance, and they are not required not to petition for decree of divorce or separation.

It is trite law that when the court is confronted with, the issue of presumption of marriage, it must satisfy itself if the said presumption was rebuttable or not before granting subsequent reliefs as prayed. Lack of contention on presumption of marriage does not waive the duty of the court to satisfy itself on whether the presumed marriage is rebuttable or not, as it is in the instant case, both parties did not dispute that they cohabited as husband and wife. Therefore, since their relationship falls within a presumption of marriage, it was indispensable for the trial court to satisfy itself if the alleged presumption was rebuttable or not, failure to do so renders the proceedings null and void. See the

case of **Richard Majenga v. Specioza Sylivester**, (supra) when confronted with a similar situation the Court stated that: -

*"It is dear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not. **In the circumstances, we are in agreement with both learned counsel for the parties that it was improper for the trial court to resort into granting the subsequent reliefs prayed, before satisfying itself on the existence of the presumed marriage."** [Emphasis added].*

Evidently, in the cited case the court of appeal faulted the lower court's decision for not satisfying itself that there was a rebuttable presumption, and not for failure to grant a decree for divorce or separation.

Where there is a "Rebuttable presumption of marriage" the

court presumes that marriage exist until evidence is adduced otherwise. Therefore, the court is duty bound to determine this issue and receive evidence from both sides before determining subsequent reliefs. Evidently, deciding on division of matrimonial property before rebuttal of presumption is like, "riding a cart before the horse".

Therefore, had the first appellate court considered the crucial legal issue discussed above, it would not have fallen into the same mistake and uphold the decision of the trial court.

Certainly, upon careful scrutiny of the cited decision, it is my considered view that Mr Ndunguru's argument is misconceived. It is obvious that **Mr. Richard Majenge's case** (supra) holding is misinterpreted. In that case the Court of Appeal referred to two scenarios; where it is established that there is a marriage the court may grant a decree of divorce or separation, and where there is a presumption of marriage and the presumption is rebutted then the court may grant reliefs as if there is dissolution of marriage or separation.

In the circumstances, I find that the appeal has merit basing on the above reasoning. It is hereby allowed. I nullify the proceedings of the trial court, quash the judgement and the subsequent orders thereto, I also nullify the first Appellate court proceedings, judgement and subsequent orders as they stemmed from a nullity proceeding.

Given the nature of the case, I make no order as to costs.

Right of Appeal Explained




S.C MOSHI

JUDGE

30/11/2021.