IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

PC CIVIL APPEAL NO.70 OF 2021

(*Originating from Matrimonial Appeal No.9 of 2019 Ifakara District Court Arising from Matrimonial cause No.73 of 2019 Ifakara Primary Court*)

MAUA SHABANI.....APPELLANT

VERSUS

MOHAMED LUKAFUMBILA.....RESPONDENT

Date of Last Order: 16th July, 2021
Date of Judgment: 29th November 2021

JUDGMENT

LALTAIKA, J.:

In this judgment the Appellant **MAUA SHABANI** is challenging the decision of the District Court of Ifakara which was delivered on the 11th day of March 2020, originating from the Matrimonial Cause No.73 of 2019, at Ifakara Primary Court.

A brief history of the matter is that, the Respondent Mohamed Lukamfumbila filed a matrimonial proceeding in Ifakara Primary Court. Having heard the parties and their witnesses, the trial court found that the marriage between the parties had broken down beyond repair. Consequently, the marriage was dissolved and matrimonial assets were subjected to equal division between the parties. The appellant was not

satisfied on how the assets were divided. She appealed to the District Court of Ifakara **in Matrimonial Appeal No. 09 of 2019.** After the hearing, the District Court concluded that the division of the matrimonial assets was fair and just whereof the trial court decision was upheld. Dissatisfied, the appellant has again filed this appeal on the following grounds:

1. *That, the trial Magistrate erred in law and fact by holding that there was marriage between the Appellant and the respondent while there was no evidence to prove that.*
2. *That the trial magistrate erred in law and fact to find that the relevant properties were matrimonial property while were not and the respondent did not contribute anything to their acquisition.*
3. *That the trial magistrate erred in law and fact in dividing equally the stated properties between the appellant and the respondent while evidence showed that the properties were solely acquired by the appellant and her late husband.*

Pursuant to the above grounds, the appellant prays for this honourable court to allow the appeal, quash and set aside the whole decision and all consequent order(s) of the district court. She is also praying for any other orders, and other reliefs this honourable court shall deem fit and just to grant.

When the appeal was called for hearing, the appellant was represented by Mr. Musabila Mkwavi Mndeva Ntimizi, learned Advocate whereas the respondent enjoyed legal services of Ms. Shija Paul Kaseko, learned Advocate. It was ordered that the case proceeds by way of written

submissions as prayed by counsel for the appellant under a jointly agreed schedule.

In submission in chief the appellant submitted that the trial magistrate erred in law and fact by holding that there was marriage between the appellant and the respondent while there was no evidence to prove it. Section 25(1) of the Law of Marriage Act No.5 of 1971 was referred to. Moreover, the appellant invited this court to the case of **Zacharia Lugendo Vs. Shadrack Lumilang'omba [1987] T.L.R 31** and the case of **Francis Leo Vs. Paschal Simon Magana [1978] L.R.T 22**. In both of these decisions, the court insisted on the evidence of marriage to be a marriage ceremony.

Applying the case laws to the present matter the appellant submitted that since when the matter was in the primary court, she had insisted that there was no marriage between her and the respondent but she was declined and her testimony was not recorded. Therefore, the learned counsel contended, since the appellant disputed on the existence of marriage it was the onus upon the respondent to prove the same by providing concrete evidence. No evidence was provided to establish that there was marriage between them.

Submitting on the ground of appeal relating to the properties whether they were matrimonial property or not, it was submitted that the properties relevant to this matter were two houses at Kwimba, one house at Ifakara, one farm (twelve acres) and two "bajaji" motor cycles. The existence of marriage is fundamental and paramount for the stated properties to be given the status of matrimonial properties. Since the appellant denied to have contracted marriage with the respondent and

the respondent had failed to establish marriage between them, there was no marriage hence the said property could not be termed as matrimonial property.

Finally, on the third ground of appeal where the appellant disputed on equal division of the properties, the appellant submitted that the trial magistrate erred in law and fact to divide the properties equally while the evidence shows that those properties were solely acquired by the appellant and her late husband. In the trial court she narrated that, together with her late husband they managed to acquire five houses. After selling the said houses she managed to get other properties at Ifakara while the respondent was in Mwanza.

Responding to the grounds of appeal, the respondent submitted that he is the legal husband of the appellant in this appeal as recognised under Chapter 29, section 25(3) of the Law of Marriage Act of 1971.The section provides for Islamic marriage which he, allegedly, contracted with the appellant.

Submitting on the second ground of appeal he argued that the properties are matrimonial properties which he and the appellant got during their married life. He invited the court to section 56 of the Law of Marriage Act, Cap 29 which provides for a married woman to have the same rights as a man in matrimonial properties hence the parties in this matter have equal rights in acquiring matrimonial properties. The respondent submitted further that those matrimonial properties are generally and always divided equally between the spouses. The respondent supported his argument with section 114 of the Law of Marriage Act of 1971 cap 29 and case of **Bi. Hawa Mohamed versus**

Ally Sefu (1983) CA NO.39 of 1983 as well as the case of **Sophia Mgalla vs. Adolph** Civil Appeal No.3 of 2005 where the court divided matrimonial properties between the parties.

In her brief rejoinder the appellant submitted that the respondent had relied upon the issues based on marriage which does not exist and the relationship alleged by the respondent is merely concubinage. Therefore, the learned counsel for the appellant contended, properties claimed by the respondent were under sole ownership of the appellant which were jointly acquired by herself and her late husband before she met the respondent.

I have gone prudently through the submissions advanced by both counsels. In this appeal the issue for determination is whether the appellant's grounds of appeal are meritorious.

Having in mind what has been submitted by both parties, I now turn to the merits of the first ground of appeal: whether there was marriage between the parties herein.

In this case the respondent is the one who filled a matrimonial cause seeking divorce and division of matrimonial properties before Ifakara Mjini Primary Court. Having heard the parties adduce their evidence, the trial magistrate framed the issues to be determined one of them being whether there was marriage between the parties. In analysing this issue, the magistrate finally found that they contracted an Islamic marriage as per Section 25(1)(c) of the Law of Marriage Act. The findings of the court emanated from what was stated by the respondent.

In the first appellate court, the trial magistrate also, among other issues for determination, raised the issue as to whether there was a

marriage between the parties, since the appellant had disputed about it. In her analysis the trial magistrate stated that she thought there was no dispute that parties were married in Islamic rites even though there was no any proof of certificate of marriage. The reasoning adopted by the learned District Magistrate is that since the appellant in her evidence in primary court didn't say anything on existence of marriage it means she was satisfied that there was a valid marriage between them. To this end, she supported the award of decree of divorce and division of properties. It is from this decision that the appellant appealed further to this court.

The existence of a valid marriage between the parties being the issue to be determined, I find it necessary first of all to refer to section **9(1) of the Law of Marriage Act, Cap 29 R.E 2019.** In this section marriage is defined as voluntary union of a man and a woman intended to last for their joint lives. For avoidance of doubt, section 27(1) of the Act provides for the necessity of every marriage to be contracted in the presence of at least two witnesses.

Marriage, being a special and highly valued union, the Law of Marriage Act under section 6 provides for the need of appointing the registrar in every district whose duty is mainly to register every contracted marriage be it a civil, Islamic, religious or customary form. Therefore, based on this fact it is realised that marriage as an institution is a union which is contracted openly and its existence cannot be assumed.

In the instant case the respondent claims to be a legal husband of the appellant. However, apart from his own words that they got married under Islamic rites, there is no evidence adduced before the trial court to prove that they were duly married. I have had a careful perusal of the

trial courts records and I did not see any marriage certificate admitted as exhibit or attached along with other documents when the respondent was filing this suit. Moreover, among all the witness who testified before the trial court, no one testified about the marriage ceremony between the parties.

In the case of **Joyce Peter vs. Leonard (supra)** among others things, the court insisted on the necessity of registration of marriage. In the case **of Zakaria Lugendo v. Shadrack Lumilang'omba [1987] TZHC 14 (01 June 1987**) www.tanzlii.org,in, Mwalusanya J (as he then was) stated that a mere staying with a girl in concubinage could not constitute marriage. Therefore, in addition to the words of the respondent and his witness who testified that the parties were living together, there must be evidence to prove that they were actually married.

Both the primary and district court magistrates decided this case based on unproved assertion of the respondent who claimed to have a valid marriage with the appellant without any proof. In the first appeal, the learned magistrate, irrespective of a repeated alerts that the appellant was disputing existence of a valid marriage, went ahead and "dissolved" the same basing her findings on unproved assertions.

It is a settled position of the law ever that when the issue for divorce is filled before a court of law, there are important things to consider by the trial court in order to reach a justifiable decision. The first and foremost is to ascertain whether there was a valid marriage between the parties and existence of the reasons to break the same. The answers to this issue should come from the parties by producing evidence of the same and not for the court to assume. Marriage is a ceremony which is

conducted openly in the public in front of the witnesses. Therefore, obtaining proof for the same shouldn't be a daunting nor cumbersome task. A court deciding matrimonial issues without firstly establishing whether there was marriage in the first place ends up making unjustified decisions.

In my considered view, I find that the in the absence of any recognized valid marriage, the respondent had no right to petition for divorce and trial court was not in the position to order divorce. Both lower courts misdirected themselves in holding that the parties have contracted a valid marriage recognised by law while there was no evidence to prove the same. All said and done, it is my finding that the first ground of appeal has merit.

I will argue the second and third ground of appeal together as they are intertwined. As per Section 114(1) of the Law of Marriage Act, Cap 29 R.E 2019, matrimonial properties must be acquired jointly and by joint efforts during the marriage. It is trite law that subsequent to the grant of divorce the trial court is duty bound to order division of matrimonial properties acquired during the subsistence of the marriage. In this case the issue is whether the divided properties are matrimonial. As it appears, the appellant strongly disputed that they never contracted any marriage with the respondent. I am inclined at this juncture to clarify what the law means by matrimonial proceeding. Section 2(1) of the Law of Marriage Act, Cap 29 R.E 2019 provides:

" Matrimonial proceeding" means any proceeding instituted under part II and VI of this Act or any comparable proceeding

brought under any written law repealed by this Act, in any court".

What are part II and VI all about? Having perused the said Act, I find that part II is about marriage and everything relating to marriage while part VI is about matrimonial proceedings which in a simple language are the proceedings which emanate from marital life. This brings me to the concept of matrimonial properties. As per section 114(1) of the Law of Marriage Act, Cap 29 R.E 2019.section 114 (1) provides that;

"The court shall have power, when granting or subgrating or subsequent to the grant of decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts..""

Therefore, from this provision for property to be matrimonial property it must have been acquired during the marriage by their joint efforts. Therefore, it was necessary for the court to ascertain itself on the existence of marriage before reaching the decision on whether the disputed property are matrimonial properties or not.

Based on the above position of the law, it is my finding therefore, and I am in total agreement with the appellant on this, that both trial court magistrates misdirected themselves by identifying the properties as matrimonial properties and then issue an order to divide them equally while there was no valid marriage between the parties to warranty the same. Since the respondent has failed to prove existence of a valid marriage between him and the appellant that extends naturally to the

issue related to matrimonial property. Therefore, the second and third grounds of appeal are hereby upheld.

For the reasons canvassed above I find the appeal before this court has merit. Therefore, I proceed to quash and set aside the decisions of both lower courts. I make no order as to costs due to the nature of this suit, a matrimonial cause. Each party to bear his/her own costs.

E.I. LALTAIKA

JUDGE

29/11/2021