IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 07 OF 2022

(Arising from Judgment of the District Court of Bagamoyo in Matrimonial Cause No. 01 of 2021, before Hon. B.E. Mbafu, RM dated 17/12/2021)

JUMA HAMIS.....APPELLANT

VERSUS

AMINA RAMADHANI..... RESPONDENT

JUDGMENT

Date of last Order: 01/06/2022

Date of judgement: 01/07/2022

E.E. KAKOLAKI, J

The appellant herein being aggrieved with the decision of the District Court of Bagamoyo in Matrimonial Cause No. 1 of 2021 handed down 17th December, 2021, has preferred this appeal equipped with the following grounds of appeal:

1. That, the trial Magistrate grossly erred in law and in fact for failure to evaluate that the house at Kiharaka-Bagamoyo was built by the Appellant and his wife Salima Rajabu who has not divorced and the respondent has never ever resided in the suit house.
2. That, the trial Magistrate grossly erred in law and in fact for awarding 40% to the respondent while has never resided in the suit house.

3. That the trial Magistrate grossly erred in law and in fact for failure to evaluate the tendered evidences on ownership of empty land at Kidomole which no any contribution was done by the respondent.
4. That, the trial Magistrate grossly erred in law and fact for determining joint effort on merely believing what was stated by the respondent is true.

Brief background of the matter giving rise to this appeal as captured from the trial court record can be narrated as follows. The respondent herein petitioned before the District Court of Bagamoyo for the judgment and decree on the following orders. **First**, declaration that there was presumption of marriage between her and the appellant, **Second**, the trial court be pleased to dissolve the presumed marriage between her and the appellant. **Third**, an order for equal division of matrimonial properties and, **Fourth**, any other relief(s) deemed fit and just to grant. It was in her evidence during the trial that, though not legally married and blessed with any child, the two cohabited for ten years from 2009 up to 2018 and acquired jointly one house located at Kiharaka, a motorcycle, domestic utensils, 4 plots located at Kiharaka, Mapinga and Kidomole areas. To support her presumption of marriage two witnesses PW1 their neighbour and PW2 the

Imam of Msongola mosque testified to have seen the two cohabiting under one roof at Kiharaka, despite of not being legally married. On his part the Respondent denied to have married to the respondent submitting that he had existing marriage with one Salima Rajabu since 1999 and sired two children. He said the respondent was his mere neighbour at Kiharaka since 2009 as purchased the plot there from Mohamed Sheweji Kimbunga on 10th of July 2006 (exh.D1) and erected a house therein without her contribution as he used the proceeds of one of the plot he had sold. Other properties he testified to have owned through personal efforts included motorcycle make Boxer, bought from the money borrowed from Buta Vicoba Group, a plot at Mapinga given to him by Ally Mohamed Mwinyimvua and a plot at Kidomole bought from Mohamed Mpemba since 15th September 2012 (exh.D5).

Upon full hearing of both parties' cases the trial court was satisfied that, there was a rebuttable presumption of marriage between the parties and that the two had jointly and together acquired the Kiharaka house in which 60% of its value was divided to the appellant against 40% of the respondent while amongst three (3) plots of Kiharaka, Kidomole and Mapinga the respondent was given that of Kidomole area. Unhappy with the decision the appellant is before this court to express his dissatisfaction.

With leave of the Court, the appeal was disposed by way of written submission the Appellant being represented by Mr. Samuel Shadrack Ntabaliba, learned advocate from Kazi Attorneys while the respondent assisted by Women's Legal Aid Centre (WLAC). I have keenly read the parties submissions between the lines. I find no reason to reproduce them as I intend to consider the same in the course of determination of the grounds of appeal.

Reading from the appellant's memorandum of appeal it appears to me that, though raised grounds of appeal are four but the contest is mainly on presumption of marriage and division of the properties allegedly jointly acquired and nothing else. Therefore the issues which this Court is called to determine are only two going thus, whether the trial magistrate was legally justified to find there was presumption of marriage between the parties and whether division of properties alleged jointly acquired was legally justified and to the extent awarded.

Before embarking in responding to the said issue, I wish to make clear the position of the law that, this court being the first appellate court is entitled to re-evaluate the evidence and see whether the trial court's finding were legally made and if not reverse them. This is more particularly where there

is no evidence to support a particular conclusion of the trial court or has failed to appreciate the weight of evidence or bearing of circumstances admitted or proved, or has plainly gone wrong. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported).

Now to start with the first issue on justification of the trial court's finding of presumption of marriage of parties, it is learnt from the findings of the trial court in the impugned judgment that, the court was satisfied that parties herein had never legally married although they cohabited and acquired the status of being recognised as husband and wife. The respondent supports that finding in her submission. Mr. Ntabaliba for the appellant is resisting that submission contending that, the appellant never lived with the respondent under one roof and there was no sufficient evidence to prove that fact, thus there was no marriage between them. Having revisited the evidence of both parties, I find merit in the appellant's contention that, presumption of marriage was not established by the respondent. It is the position of the law under section 110 and 111 of the Evidence Act, [Cap. 06 R.E 2019] that, he who alleges must prove and the onus of so proving lies on the party who is likely to lose if the evidence is not given proving such

fact, which in the present issue is the respondent. It was in her evidence at pages 13-14 of the typed proceedings that she lived under one roof with the appellant for ten years from the year 2009 to 2018. When cross examined by the appellant at page 18 of the typed proceedings as to who were their neighbours surrounding their house of Kiharaka she said were Fred Matembele, Juma Shabani and Saum Chombiko who could prove that they were living together. The Respondent however did not parade those witnesses instead brought in court only PW2 and PW3 not amongst the above mentioned witnesses who at pages 21 and 26 respectively testified to the effect that the parties were living under one roof without further particulars of the period. On his side the appellant's evidence was corroborated by that of DW2 who maintained that the appellant was living alone with his two children in the house and that he knew him as neighbour since 2005. In its finding the trial Court was guided with the provision of section 160(1) of the Law of Marriage Act, [Cap 29 R.E 2019] (the LMA) providing that, there shall be a rebuttable presumption that parties acquired the reputation of being husband and wife where it is proved to the court satisfaction that, the two lived together for two or more years under one

roof. It was held in the case of **Hemed Said Vs. Mohamed Mbilu** (1984) TLR 113 that:

> *"…the person whose evidence is heavier than that of the other is the one who win…"*

Had the trial magistrate appreciated the weight of evidence of DW2 who specified the time he started seeing the appellant living alone against that of PW2 and PW3 who did not specify the time they saw the parties under one roof, I am sure he would have found that the claim by respondent was not proved to the required standard hence, the presumption of marriage is rebutted. I therefore interfere with the court's findings by holding that there was rebuttable presumption of marriage between the parties for want of proof by the respondent as to the time under which the two lived under one roof. Thus the first issue is answered in negative.

Next for determination is the second issue on the legality of division of the alleged matrimonial properties. The law under section 160(2) of LMA, is categorical that, where it is established that there is rebuttable presumption of marriage but the two lived as husband and wife, one party has the right to claim from other party reliefs like any other married woman. In other words the Court has power to make consequential orders including division

of matrimonial property acquired by the parties during their relationship. See the case of **Hemed S. Tamim Vs. Renata Mashayo** (1994) TLR 197 as rightly relied on by the trial court to base its findings. It is from that legal position I hold the view that, since in this case the parties once lived assuming to be husband and wife though not to the point of acquiring a status of husband and wife, the trial court had jurisdiction to make an order for division of properties upon the application made by the respondent for the grant of such relief and proof that she had contributed to the acquisition of such properties. The same position was restated by the Court of Appeal in the case of **Hidaya Ally Vs. Amiri Mlugu** (Civil Appeal 105 of 2008) [2016] TZCA 323 (27 January,2016) www.tanzlii.go.org where the Court had this to say:

> *"Ipso jure, the wording of the above quoted section shows that the courts have power to order division of property once the presumption of marriage is rebutted just like in instances of dissolution of marriage or separation. See the case of* ***Hemed S. Tamim Vs. Renata*** *Shayo (supra). In that case the Court 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 the power under section 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 such, it is a misconception for anyone to think that division of matrimonial property can only be ordered in a valid marriage."

The above being the position of the law, the last question to be determined is whether the division of properties to the parties was justifiable. Looking on that issue the appellant's main grumble is rooted on the ownership as well as the respondent's contribution towards acquisition of two properties, the house at Kiharaka which was apportioned to the appellant by 60% and 40 % the respondent while the Plot at Kidomole Bagamoyo divided to the respondent. The appellant says the Kiharaka plot was bought in 2006 (exh.D1)and the house built therein erected out of the proceeds of sale of one plot in which the respondent had no contribution while the Kidomole plot was acquired in 2012 from Mohamed Mpemba. In her submission the respondent contrary to the appellant submits that the trial court was justified to award her that plot as she contributed towards its acquisition as rightly held at page 7 of the impugned judgment.

The provision of the law providing for guidelines towards division of matrimonial properties is section 114 of the Law of Marriage Act, Cap 29 R.E 2009.The law provides that, the properties acquired by the parties during the subsistence of their marriage or acquired by one party but developed by the other party constitutes a matrimonial property. The division of that property does not necessarily be 50/50 as the share depends on each party's contribution being monetary or physical or work done towards its acquisition or improvement. The above position of the law was stated by the Court of Appeal in the case of Bi **Hawa Mohamed vs. Ali Seif** [1983] TLR 32 which was further expounded in the cases of **Bibie Mauridi Vs. Mohammed Ibrahim** [1989] TLR 162. In another case of **Samwel Moyo Vs. Mary Cassian Kayombo** [1999] TLR 197 the Court of Appeal on the division matrimonial assets authoritatively held that:

> *"...its apparent that the assets envisaged there at must firstly be matrimonial assets, secondly, must have been acquired by them during the marriage and thirdly, they must have been acquired by their joints efforts. The three conditions must exist before court's power to divide matrimonial or family assets under section 114 (1) of the Law of Marriage Act is involved.... "*

Now back to the matter at hand, the appellant challenges the trial court's order for division of the house Kiharaka and the Kidomole plot to the respondent, the reason being that, he never lived with the respondent and also the property was acquired by himself and without respondent's contribution. Looking at the evidence adduced by both parties during trial, it is apparent to me that the plot of Kiharaka was purchased by the appellant in 2006. However the respondent's contributions towards improvement of the plot by erection of the house in dispute cannot be disregarded. As per PW3 the appellant introduced to him the respondent as "mama watoto" and that by that time she was involved in restaurant business which implies that she was not an idle sleeping woman and was also contributing financially to the family income that enabled erection of the said house. No doubt, she was also performing her chores as it is from the records that together they were living with other two children of the Appellant. It was also in her further testimony that, she once remained at home supervising masons during construction of the house when the appellant travelled. As alluded in the above cited cases that, performance of domestic works by a housewife suffices to be considered as a contribution in acquisition of matrimonial properties as it was stressed in the case of **Bibie Mauridi** (supra). With the

above evidence, I do not see therefore how the trial court could have failed to believe the respondent on the improvement of the Kiharaka plot and acquisition of the disputed house instead believe Appellant's unconvincing story that the respondent did not contribute anything over that house. I therefore find the share 40% apportioned to the respondent in respect of the said was justifiable and I see no reason to disturb it. As regard to the acquisition of Kidomole plot (exh.D5) the respondent in her testimony claimed to have owned that plot with the appellant. When cross examined at page 19 of the typed proceedings, she testified to have purchased it jointly with the appellant from Mohamed Mpemba and Tatu. A glance of an eye to the said exhibit D5 showed that, the same was bought in 2012 by the appellant and not both while the vendor was only Mohamed Mpemba and not jointly with Tatu as claimed by the respondent. That is a clear picture that she told lies to the Court on the parties to sale agreement as she did not even know as when it was purchased. In view of that evidence, I am satisfied that the trial court did not properly consider the evidence as to the acquisition of that plot hence wrongly awarded it to the respondent. Thus, issue is partly answered in affirmative and partly in negative.

In the event the trial court's order on the award of the Kidomole plot to the respondent is varied and the same is restored to the appellant. The rest of the findings and orders remain the same. The appeal is therefore partly allowed to the extent explained above and partly dismissed.

Being a matrimonial appeal, I make no orders as to costs.

DATED at Dar es Salaam this 01st day of July, 2022.

E. E. KAKOLAKI

JUDGE

01/07/2022.

The Judgment has been delivered at Dar es Salaam today 01st day of July, 2022 in the presence of both parties and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

01/07/2022.