

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC. MATRIMONIAL APPEAL NO. 4 OF 2019

(Arising from Matrimonial Cause No. 8 of 2017 of District Court of Dodoma at Dodoma)

SENYAEL SEIYALE KITOMARY APPELLANT

VERSUS

FELCULAR M. MASAWE RESPONDENT

25/4/2022 & 16/5/2022

JUDGMENT

MASAJU, J

The Respondent, Felcular M. Masawe, successfully petitioned the Appellant, Senyael Seiyale Kitomary, for the orders that there was marriage between them, divorce and distribution of matrimonial properties in the District Court of Dodoma at Dodoma. Aggrieved with the decision, the Appellant has come to the Court by way of an appeal.

The Appellant's Petition of Appeal is made up of four (4) grounds of appeal. When the appeal was heard in the Court on the 6th day of August, 2020 and the 25th day of April, 2022 both parties were represented. The Appellant was represented by Mr. Francis Kesanta, the learned counsel while the Respondent was represented by Mr. Fred Kalonga, the learned counsel.

Submitting in support of the appeal the Appellant argued that the trial Court erred in law and fact in entertaining an incompetent petition which was instituted in violation of the provisions of law. That, the petition at the trial Court was for divorce in the sense of petition for divorce filed, however, it contained no prayer for divorce save for division of matrimonial assets and punitive damages. That, since the Respondent alleged that the matter was under presumption of marriage, the Respondent then could not petition for divorce. That, the Respondent could apply for other reliefs apart from filing a petition for divorce.

The Appellant cited the case of **Harubushi Seif V. Amina Rajabu (1986) TLR** to support his argument. The Appellant went on submitting that section 81(a) of the Law of Marriage Act [Cap. 29] provides for petition for divorce, declaratory decree, separation and annulment only. Section 81(b) provides that other reliefs not stipulated above can be invoked through chamber Applications. That, the Respondent ought to have filed a chamber Application. The Appellant prayed the Court to nullify and quash the trial Court's decision and order trial *de novo*.

That, if the Court sees the petition for divorce was proper, then the petition was premature since it violated section 101 of the Law of Marriage Act [Cap. 29] which requires a matter be referred to a marriage reconciliation board for certification that reconciliation has failed. That, the Appellant was not summoned before the board, hence the board was wrong to conclude that it failed to reconcile the parties.

The Appellant then submitted on the 1st and 4th grounds of appeal jointly that there was no presumption of marriage between the parties. That, the parties were boyfriend and girlfriend who used to visit each other. That, the Respondent was a college student at St. John University who stayed at the college hostel full time and never lived at the Appellant's house. That, the Respondent's evidence in the trial Court is full of contradictions on whether she lived with the Appellant under the same roof. Thus, the Respondent's contradictory evidence should be disregarded as decided in **Emmanuel Ibrahim Nanyaro V. Peme Olesaitaban [1987] TLR 47** and **Tanzania Breweries Ltd V. Antony Nyingi (CAT)** Civil Appeal No. 119 of 2014.

That, the trial Court relied upon engagement photos which can not be disputed but the parties could not get married because the Respondent had a valid marriage to one Kalista Materu. That, there was no evidence that the said marriage was terminated apart from the certificate of divorce tendered.

As regards the 2nd and 3rd grounds of appeal, the Appellant submitted that there was no status of husband and wife so the properties concerned belongs to the Appellant. That, the evidence in the trial Court did not prove contribution on the part of the Respondent even if there would be presumption of marriage. Thus, the disputed house belongs to the Appellant who was a soldier at the JWTZ. That, there also was no evidence on contribution of the motorvehicle.

The Respondent finalized his submissions by submitting that the trial Court wrongly awarded the Respondent TZS 50,000,000/= as punitive

damages against the Appellant. The Appellant prayed the Court to allow the appeal with costs.

On his part, the Respondent contested the appeal by submitting that the presumption of marriage was proved. That, the Respondent cohabited with the Appellant for not less than 7 years from October, 2009 up to March, 2017. Thus, beyond the period for presumption of marriage which in law is 2 years of cohabitation. That, the Respondent had already divorced the other man as the certificate of divorce (exhibit PE3) so confirms as it is enough to prove.

As regards the 2nd and 3rd grounds of appeal, the Respondent submitted that, the trial court rightly ordered for division of matrimonial assets because the parties were already legally recognized spouses who both contributed in the acquisition of the matrimonial properties in question. That, the Respondent contributed through her salary (Exhibit PE4) and the supervision of the construction of the matrimonial house masons (PW3 and PW4).

As regards the 5th ground of appeal, the Respondent submitted that the petition for divorce was in accordance with the Law of Marriage Act [Cap. 29] thus it did not violate section 81(a) of the Law of Marriage Act [Cap 29] because by then the spouses had qualified for marriage. The Respondent was therefore eligible for petitioning for divorce pursuant to section 60(1) of the Law of Marriage Act [Cap 29].

That, **Gabriel John Musa V. Voster Kimathi** (CAT) Civil Appeal No. 344 of 2019 Dodoma Registry guides that prior to the Court order the

distribution of matrimonial property there must be first a finding that there was a marriage between the spousal parties. The Respondent prayed the Court to dismiss the appeal for want of merit.

In rejoinder, the Appellant maintained his submissions in chief and added that, there was no proof of the Respondent's contribution in acquisition of the alleged matrimonial assets. That, the exhibits relied upon by the Respondent were just tendered in Court for identification not admission. The Appellant prayed the Court to allow the appeal with costs.

That is what was shared by the parties in support of, and against the appeal in the Court.

In this case, the Respondent alleges to have cohabited with the Appellant for nearly eight (8) years, from October, 2009 to 27th day of March, 2017. That, they lived under one roof as husband and wife throughout that time. That, they started dating when she was a student at St. John's University here in Dodoma. That, in October, 2009 the Appellant engaged her by giving her an engagement ring then after that they started living together. The Respondent alleged to have been working at Sengerema, Mwanza where she applied for leave without payment in 2013 and came to live with the Appellant in Dodoma. That, here in Dodoma she got a contractual job at a non Governmental Organisation known as Christian Social Services Commission in 2014 (Exhibit PE1) where her take home salary was TZS 2,500,000/= as per her salary slip (Exhibit PE2).

The Respondent alleged to have contributed in buying of the parties' plot by paying half of the price and on construction of the parties' alleged

matrimonial home on the said plot located at Mipango area, Mbwanga. That, she bought bricks, concrete, stones, cement, roofing timber, iron bar, binding wire, nails, grills, electricity wiring, paid for electricity charges, bought mosquito wires and that she paid for fixing of the grills. The Respondent alleged also to have contributed in construction of the said house as well as supervision of the same, since the Appellant was much occupied in his work as a soldier. That, he also travelled out of the Country to Lebanon in September, 2015 to March, 2017 when he came back.

The Respondent tendered purchase receipts of the building materials which were admitted in the trial court (Exhibit PE4). The Respondent acknowledged the Appellant's contribution in construction of the alleged matrimonial house, that, the Respondent mostly contributed in finishing of the said house. The Respondent also alleged to have contributed in the purchase of house hold assets and one motor vehicle T 404 AUD make Toyota Carina which was bought in July, 2017.

The Respondent alleged to have been chased out of the matrimonial house on the 28th day of March, 2017 by the Appellant. That, she thus referred the matter to the reconciliation board at Majengo Ward. That, the Appellant was summoned but refused to attend. That, the summons was received by the Appellant's daughter. That, she then petitioned in the trial Court.

On his part, the Appellant contests being under presumption of marriage with the Respondent. That, they were only in a boyfriend and girlfriend relationship from 2008 to 2013 when he found out the Respondent

was married to one Calist Materu thus they broke up. That, they never lived under the same roof as husband and wife and that, the Respondent never contributed anything in acquisition of the properties alleged to be matrimonial properties. That, the same are his own properties.

In the trial Court, the Respondent brought three (3) witnesses. Neema Michael Mgomba (PW2) testified to have worked for the parties as a housemaid for two years from 2014-2016. That, she lived with the parties and she knew the parties to be husband and wife as they both lived under the same roof at Nkuhungu, Dodoma. That, she also knew the matrimonial house at Mipango area, which was under construction. That, she used to go with the Respondent for supervision. That, the Respondent used to buy various construction materials.

Hassan Idd Sanda (PW3) and Omary Salum Kitwanga (PW4) also testified to have known the Respondent who recruited them, PW3 being a mason who also used to keep the house keys and PW4 who was a painter. PW3 also alleged to have communicated with the Appellant through WhatsApp video call and that he knew the Appellant as the Respondent's husband. The witnesses also testified on the Respondent's supervision and contribution in building of the alleged matrimonial house as they sometimes went with the Respondent at the shop for purchase of some building materials.

The Court is of the considered position that there is proof that the Respondent and the Appellant lived together as husband and wife under section 160 (1) of the Law of Marriage Act [Cap 29] as per the evidence

adduced in the trial Court by PW1, PW2 and PW3 and since the parties were proved to have been engaged. Regarding the Respondent's alleged marriage to one Calista Materu, the Respondent proved to have been divorced by tendering certificate of divorce (Exhibit PE3) which was not objected by the Appellant in the trial Court.

Section 160(1) of the Law of Marriage Act, [Cap. 29] proves, 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 marriage"

In the instant case the parties were proved to have cohabited for nearly eight (8) years hence considered duly married as the presumption of marriage was not rebutted in the trial Court. The Respondent rightly referred the matter to the reconciliation board since they were considered duly married. There is proof that the Respondent was summoned and was aware of the matter as it can be reflected at page 5 of the typewritten copy of proceedings of the trial Court where he acknowledged his daughter to have received the copy of summons of the conciliation board on his behalf. Hence the Respondent rightly referred the matter to the trial Court as petition for divorce where one among the orders she sought was an order of the court that there was presumption of marriage between the parties. Thus, the trial court was duty bound to analyse the evidence and satisfy itself on whether or not the parties were presumed married as for the conditions set under section 160(1) of the Law of Marriage Act [Cap 29]. The trial Court rightly analysed the evidence and ruled on the existence of marriage between the

parties prior to making orders for division of matrimonial properties as the guidance of the Court in **Gabriel John Musa V. Voster Kimati (supra)**.

The division of the matrimonial properties acquired under marriage is guided by section 160 (2) as well as section 114 of the Law of Marriage Act [Cap 29]. In the instant case, the Respondent proved to have her contribution through supervision and monetary contribution as per the purchase receipt of materials bought (Exhibit PE4), proof of her employment here in Dodoma at Christian Social Services Commission (Exhibit PE1) and her monthly earning by then (Exhibit PE2). Also, the evidence by PW2, PW3 and PW4. On the other hand, the Respondent acknowledge the Appellant's contribution as well. On his part, the Appellant had no any documentary proof of how much he earned monthly. But there is evidence on his contribution on the finishing of the house after being paid US Dollars 14,000,700/= as payment for his mission in Lebanon as a UN peace keeping soldier although there was no documentary proof to prove the same. His witnesses Kindamba Hassan Ndekelo (DW2) and Elian Herman (DW4) also testified to have worked on finishing of the house, DW3 being an electrician and DW4 who fixed the tiles in the house.

The Respondent also testified to have been maintained by the Appellant during the subsistence of their marriage, even when the Appellant was on a mission in Lebanon where the Respondent was paid ½ of his salary for maintenance of the Respondent and the Appellant's two issues/children who were staying with the Respondent.

As regards the motor vehicle T 404 AUD make Toyota Carina, the Court finds that it was bought by the Appellant on his own effort after the parties separation in July, 2017 as it was testified by the Respondent herself thus the same can not be said to be one among the matrimonial properties.

Contrary to the Appellant's allegations before the Court, the trial Court never awarded the Respondent TZS 50,000,000/= as punitive damage.

Thus, the appeal is hereby dismissed for want of merit, save that the Court varies the trial Court's decision on distribution of matrimonial properties in the sense that, the matrimonial house located at Mipango area, Mbwanga within Dodoma City shall be divided equally between the parties. The said matrimonial house shall be valued by a government valuer at a current market value. The party interested in ownership of the property shall compensate the other party half of its value and retain the house. Otherwise, the property shall be sold at a public auction and the proceeds thereof shall be equally distributed between the parties.

The motor vehicle T 404 AUD make Toyota Carina is not subject to distribution since the same belongs to the Appellant exclusively.

The parties shall bear their own costs.



GEORGE M. MASAJU

JUDGE

16/5/2022