THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MATRIMONIAL APPEAL NO. 10 OF 2020

(Originating from Matrimonial Appeal No. 20 of 2019 District Court for Mbeya
Originating from Matrimonial Case No. 30 of 2019 of Mwanjelwa Primary Court)

ANTHONY ISDORY NGONDO ..... APPELLANT

VERSUS

TUNDONDEGHE NASONI MWAKIFUNA ..... RESPONDENT

JUDGMENT

Date of last order: 25/05/2022
Date of judgment: 29/06/2022

NGUNYALE, J.

The parties to this appeal were in a union which was defined by the trial Court as concubinage because they were living together as husband and wife while not dully marriage. In the course of the said union, they were blessed with three issues namely Enock Anthony (12), Ernest Anthony (9) and Erick Anthony (3) also a suit house. The union went sour and the efforts to reconcile the parties failed, hence, the appellant preferred Matrimonial Cause No. 30 of 2019 before Mwanjelwa Primary Court seeking divorce and distribution of what he termed as matrimonial

properties. The sole reason for divorce was unending conflicts between the parties.

The learned trial Magistrate entertained full trial which was concluded on 12th day of July 2019. The Court found that there was no marriage to dissolve because the appellant had a subsisting Christian marriage with another woman so he had no capacity to marry another woman. The trial Court invoked presumption of marriage under section 160 of the Law of Marriage Act to order division of the house alleged to have been obtained by joint efforts during the subsistence of the union. It further ordered the children to be in custody of the respondent and the appellant to provide maintenance of 70,000/= per month, the house be subjected to valuation and the appellant to get 30% of the value of the house and the respondent to get 70,000/=.

Following the above decision, the respondent was aggrieved, she preferred Matrimonial Appeal No. 20 of 2019 before the District Court protesting the award of 30% of the value of the house to the appellant. She complained that they had no valid marriage and the house she constructed by herself therefore the appellant was not entitled to any share. The District Court heard the appeal and found that the trial Court correctly entered its decision, so it went on to dismiss the appeal entirely.

The present second appeal as preferred by the appellant on 22nd day of May 2020 was premised in four grounds of appeal per petition of appeal of the appellant; -

1. *That the District Court grossly erred in law and fact for declaring that the decision of Primary Court was right while there was no evidence adduced by respondent to verify how much matrimonial properties got without sharing with the appellant.*
2. *That the District Court grossly erred in law and fact for not considering the evidence adduced by SM2 and SM3 that the appellant and respondent lived as husband and wife.*
3. *That the District Court grossly erred in law and fact for relying and basing its decision of Primary Court without considering that the evidence adduced by SM4, SM5, SM6 and SM7 were proved on balance of probability that appellant is the one who bought an area and is the one who built a house.*
4. *That the District Court had miserable failed as it has given jurisdiction power as appellate court for appeal from Primary Court, but still failed to determine the percentage given between appellant and respondent due to the matrimonial property.*

The appellant prayed the Court to allow the appeal with costs and quash the decision of the Primary Court.

The appeal was heard by written submission, timely filing of the relevant submission was highly commendable by the Court.

It was the humble submission of the appellant generally that, the trial Magistrate did not consider that section 160 (1) (2) of the Law of Marriage Act is very clear due to the presumption of marriage simultaneously he

referred the Court to Court of Appeal case of **Hemed S. Tamimu vs. Venata Mashayo** (1994) TLR 197 in which it was observed that;

> *"where the parties have lived together as husband and wife in the course of which they acquired a house, despite the rebuttal of the presumption of marriage as provided for under section 160 (1) of the Law of Marriage Act 1971, the courts have the power under section 160 (2) of the Law of Marriage 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..."*

He stated further that in the present case there is no contention that the appellant and the respondent were husband and wife, the issue is why the appellant is given 30% while both of them shared their efforts on matrimonial assets? The evidence from SM4, SM5, SM6 and SM7 is very clear that it was the appellant who bought the plot where the said house was built in the year 2007. Not only that he also contributed in its construction as proved by the witnesses. He referred the case **of Bi. Hawa Mohamed vs. Ali Seif** (1983) TLR where the Court of Appeal decision is very clear that in distributing matrimonial assets, Courts have to consider the contribution of each party towards the acquisition of said properties. The appellant was of the view that the trial Court mislead itself in determination of division of matrimonial properties because the evidence of the appellant could not prove how she acquired the said plot and how she built the said house. The Court of Appeal directed the lower

courts to consider the contribution of each party towards acquisition of matrimonial properties.

The trial Court had no reason in ordering 30% to the appellant, therefore the appellant prays the Court to allow the appeal in order that both parties should acquire a share based on their respective contribution towards acquisition of the suit property.

From the outset, the respondent strongly contested the submission of the appellant. She submitted that during determination of this appeal the Court should put into consideration of two things namely; -

(i) *Failure of the appellant to comply to the order of providing maintenance to the issues of the union between the appellant and the respondent while the appellant does not dispute on that order.*

(ii) *Failure of the appellant to argue two grounds of appeal as made out in the petition of appeal and reproduced in the written submission of the appellant in supporting his appeal.*

The appellant was ordered by the trial Court to provide maintenance to the children since July 2019. To date he has not provided such amount event for a single month. She stated that the order is not the subject of this appeal save for the grounds of appeal, but she prayed the Court to address on this issue.

The appellant raised four grounds of appeal and he also reproduced in his submission in support of the appeal. unfortunately, he has argued only

one ground of appeal. His submission centres on the fourth ground of appeal about failure of the trial Court to consider percentage of contribution of the parties towards acquisition of the matrimonial house. The appellant has not stated specifically about abandoning the rest of the grounds of appeal but his failure to submit on the same suggests that the appellant had decided to abandon the other grounds of appeal. The respondent as well stated that she will submit only one ground of appeal.

The respondent submitted that the provision of the Law of Marriage Act cited by the appellant and the cases cited states a correct position of the law in matrimonial disputes in Tanzania. However, the respondent disagrees on the argument that the lower court of law slipped or ignored the position stated in the law and the cases. She stated that it is in record in Primary Court of Mbeya at Mwanjelwa that the appellant and the respondent failed to prove existence of marriage in accordance with the laws and practices of Tanzania. Both, the appellant and the respondent successfully proved that they lived together for more than two years and were blessed with children. Marriage was not established instead presumption of marriage under section 160 (1) of the Marriage Act Cap 29 R. E 2019 was invoked to remedy the parties. The order of division of the house by 30% and 70% means both section 160 (2) of the Law of

Marriage Act and the case of **Hemed T. Tamimu vs. Renata Mashayo** (1994) TLR 197 were followed. The respondent submitted that she contributed more than the appellant in acquiring the suit house. She bought a plot of land in 2007 before she started living with the appellant.

She stated further that it was proved before the Primary Court that she bought the plot using her salary which the respondent got from her employment and she also took a loan from NMB for building the house. She proved before the trial Court that she was employed and she took a loan. All those proved that the respondent made a bigger and greater contribution towards the acquisition of the house in question. In the end result the respondent prayed the Court to dismiss the appeal as the same lacks merit and the decision of lower Courts be upheld and enforced.

In a brief rejoinder the appellant reiterated what he submitted in his submission in chief and he insisted that the contributed in the acquisition of the suit house.

Having in mind the rival submission of the parties for and against the appeal I wish to be guided by the evidence available, law and factual situation in order to determine whether it was lawful for the Court to award division of the alleged matrimonial house by 30% and 70% because the complaint in ground No. 3, 4 and 1 centres to the acquisition

of matrimonial properties. In order to have legal legs to answer the complaints about acquisition of the alleged matrimonial properties it is crucial to answer the second ground of appeal which provides; -

> *That the District Court grossly erred in law and fact for not considering the evidence adduced by SM2 and SM3 that the appellant and respondent lived as husband and wife.*

It is very important to answer whether the parties to this appeal were husband and wife. The trial Court ruled that the union between the appellant and the respondent is presumption of marriage under section 160 (1) and (2) of the Law of Marriage Act Cap 29 R. E 2019 because they lived together as husband and wife for quite long without any other form of marriage but the trial Court invoked presumption of marriage. Presumption of marriage was invoked in order to protect the couples rights in the dissolution of the long cohabitation.

It was not in dispute at the trial and during the first appeal that the appellant had another wife dully married under Christian rites. During trial the appellant said nothing about having another wife, but the appellant in her testimony testified in part I quote; -

> *"... mimi tulikuwa tunaishi nae kama mpenzi wangu, alikuwa anakuja pale machana anaondoka, yeye ana mke wake na amefunga nao ndoa ya kikristo yupo Iganzo na amejenga naye nyumba huko mimi sikujua mapema. Baadae alitaka anioe niwe mke wake wa pili mimi niliwaambia wazazi walikataa baada*

ya kugundua ameoa mimi niliamua kuzaa nae watoto watatu, kwa sababu sikupenda kuhangaika baadae tukawa hatuna mahusiano mazuri, pia alikuwa analazimisha awe anaishi na mimi, pia hatunzi watoto na wala hajui wanalala wapi wanakula nini..."

The above testimony speaks louder that the appellant had another subsisting marriage under Christian rite. The appellant could not cross examine on the testimony that he has a subsisting monogamous marriage, it is settled law that failure to cross examine on material issue amounts to acceptance of the truthfulness of the other parties account. The testimony that the appellant had a subsisting Christian marriage was corroborated by the testimony of DW3 Royce Peter Mwakifuna the father of the respondent when he said;

'ndoa haujafunga wewe una mke wako uliyefunga naye ndoa Roman Catholic'

Therefore, from the facts and evidence there is no doubt that the appellant was under monogamous marriage with another woman. The issue is whether the appellant who was under monogamous marriage can fall under presumption of marriage with the respondent. In order to appreciate this issue, it is important to refer section 160 of the Law of Marriage Act which provide a guide to presumption of marriage.

(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.

Upon a careful scrutiny of the above provision, it is open that the intention of the legislature is not to defeat the spirit of the intention of the Law of Marriage Act to protect the sanctity of any form of marriage. The intention is not to bring the unnecessary encroachment to the sanctity of marriage but rather to protect the couples who will be unjustly denied their rights particularly the relief sought when the relationship is dissolved after a long cohabitation.

Therefore, the provision cannot be invoked to defeat the legally recognized monogamous marriage. Therefore, when the Court is satisfied that the parties had no capacity to enter into marriage presumption of marriage cannot stand in their favour. In the present case the appellant

was under monogamous marriage dully contracted under Christian rites before he met the respondent. In the circumstance the cohabitation between the appellant and the respondent however being for long time cannot attract presumption of marriage. It does not matter for how long the parties lived together. The long cohabitation does not automatically convert concubines into wives. Section 15 (1) of the Law of Marriage Act is very relevant her which provides; -

> *"No man, while married by a monogamous marriage, shall contract another marriage."*

Guided by the above provision it is open that the appellant who had a subsisting monogamous marriage had no capacity to contract another marriage including presumption of marriage. It is illegal to impute presumption of marriage against the appellant who had not renounced his Christianity. In our jurisdiction the monogamous marriage is purely to the follower of the Christian religionn of which if the parties choose to be Christian, he is obliged to follow his faith so long that he did not renounce his Christianity. In other words, there is restriction for a Christian who is married to contract another marriage.

In the case of **Francis s/o Leo vs Paschal Simon Maganga**, 1978 LRT No 22, his Lordship, Hon. Mfalila, J (as he then was) held that;

"A Christian who has neither renounced his faith nor divorced his wife has no capacity to marry another woman and therefore cannot invoke the presumption under section 160 in his favour"

I am settled in my mind that the trial Court properly found that presumption of marriage was not relevant in the present case, now what about division of the alleged matrimonial house. The 1st, 3rd and 4th grounds of appeal raise a complaint about division of the matrimonial house whether the division was proper. The pertinent question to be answered by the Court is whether it was legal to grant division of the properties alleged to be jointly acquired in a circumstance where there is no presumption of marriage.

In the course of composing judgment, the Court found it prudent to re-open proceedings for the parties to address the following issue; -

Whether it was proper for the trial Court to grant an order of division of a house in absence of presumption of marriage?

Both were not represented by learned Counsels, they were fending my themselves. The appellant stated that it was legal because he is the owner of the house in dispute because he personally bought the plot. In her side the respondent said that division was illegal because the appellant found her with the plot of land when they started their relationship. Also, they had no marriage the house cannot be divided.

The appellant in his submission relied to section 160 (1) & (2) of the Law of Marriage Act and the case of **Hemed S. Tamimu** (supra) that the dissolution of their union goes with consequential orders of division of matrimonial properties which were jointly acquired during subsistence of their union. He alleged that he proved that he contributed towards acquisition of the matrimonial house. He stated that he deserves more that 30% of the share of the suit house. The respondent quickly respondent that existence of marriage was not established and the suit house belongs to her.

It has been established that presumption of marriage does not fit in the present situation. The long cohabitation of the parties could not automatically amount to marriage instead their long cohabitation amounted to what is called technical adultery because the appellant had no capacity to enter into any form of marriage including invoking presumption of marriage because he had a subsisting monogamous marriage, see the case of Celestine **Kilala & Halima Yusuph vs Restituta Celestine Kilala** (1981) TLR 76. Since it has been established that he cannot hide himself under presumption of marriage likewise it is illegal for division of matrimonial assets through presumption of marriage.

It is in public domain now that the presumption of marriage has not been established or invoked to the parties, the issue of the division of matrimonial assets as entertained by both courts below was illegal. Looking at section 160 (2) and section 114 (2) of the Law of Marriage Act, the issue of the division of the matrimonial assets comes in if the parties are presumed to be married or formally married as per the Law of marriage Act, Cap. 29 R.E 2019. (See the case of Bi Hawa Momahed vs Ally Seif, 1983 TLR 32. Bibie Maulid vs Mohamed Ibrahim 1989 TLR 162, and Yesse Mrisho vs Sania Abdul, Civil Appeal No 147 of 2016).

It is my sincere view that, if the appellant claim to have any share on the properties of the respondent, she can enforce the division of the properties by way of filing the normal suit before a court of competent jurisdiction if she will prove that there was a contract of any kind between the parties but not a marriage contract. Likewise, the respondent can seek necessary relief about custody and maintenance of the children through Juvenile Court.

As a whole then, and on account of what has been endeavoured, it is settled that presumption of marriage was not established in favour of the parties to this appeal. Therefore, the orders of division of the alleged matrimonial house as ordered by the trial Court and upheld by the first

appellate Court were illegal in absence of presumption of marriage, the respective orders are hereby quashed and set aside. Appeal dismissed.

Dated at Mbeya this 29th day of June 2022.

D. P. Ngunyale
Judge
29/06/2022