IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 03 OF 2021

(Originating from RM's Court of Arusha in Matrimonial Cause No. 29 of 2018)

ELIAMINI JONATHAN LOI.....APPELLANT

VERSUS

GRACE CRISPIAN.....RESPONDENT

JUDGMENT

21/09/2022 & 06/10/2022

BARTHY, J

The appellant Eliamini Jonathan Loi aggrieved with the decision of the Resident Magistrate's court of Arusha at Arusha in Matrimonial Cause No. 29 of 2018, knocked the door of this court armed with eight (8) grounds of appeal as depicted from the memorandum of appeal.

The records of the court reveal that the appellant and the respondent cohabited for the period of 2015 up to 2018 when their still fresh love came to face the turmoil. Their union however, was blessed with one issue Clarisa born on 20/10/2016.

The once sweet relationship when turned sour, the respondent filed a matrimonial cause to the Resident Magistrate's Court of Arusha at Arusha seeking a declaration that there is a rebuttable presumption that the petitioner and the Respondent were duly married, an order to dissolve the

marriage, maintenance for the petitioner and their issue one Clarisa and division of the properties acquired jointly during the union.

After hearing the matter, the court held that there was a presumption of marriage between the appellant and the respondent. The court went ahead to distribute the assets that were jointly acquired during the union. It gave orders of custody to the respondent and maintenance to the respondent and the issue to be provided by the appellant.

On the division of assets, the respondent's share was Tsh. 58,300,000/- being the funds she borrowed to inject in the business during their union, she got one motor vehicle make Toyota Noah with Registration No. T 824 DLB, the respondent to be refunded Tsh. 4,000,000/- used to repair the house of the appellant and the refund of Tsh. 1,500,000/- used to make a fence, the custody of the child to be with the respondent.

On the other hand, the appellant got one motor vehicle make Toyota Corolla (dark blue), to pay Tsh. 100,000/= monthly for maintenance of their child one Clarisa and provide for medical insurance and cater for her other needs and school fees.

The said decision aggrieved the appellant who is now before this court seeking to challenge the decision of the trial court.

When the appeal was called for hearing, the appellant enjoyed the services of Mr Goodluck Peter the learned counsel and the respondent was fending for herself. The appeal proceeded orally.

Submitting in support of the application, Mr. Peter prior to making his submission on the grounds of appeal he submitted that this court being the first appellate court, it has the duty to re-evaluate the evidence and

make its own findings and conclusion. He cited the case of **Dr. Maua A. Daftari vs Fatma Salmin Said,** Civil Appeal No. 108 of 2021 (CAT-Unreported).

Addressing the grounds of appeal, Mr. Peter submitted that the appellant and the respondent started living together in 2017 after the birth of their child Clarisa.

He added that they lived together with no intention to create a marital status. Since the appellant had a valid marriage as evidenced by Exhibit D3 (Marriage Certificate between the appellant and Hansila Charles) as also proved by PW2.

He further submitted that; the duo was in concubinage relationship. It was argued the appellant did not pay any bride price. He could not marry the respondent without dissolving her first marriage with Hansila Charles.

He went on to challenge the decision of the trial court, that there were properties jointly acquired during the union which were ordered to be distributed as stated in the background of the matter.

Mr. Peter contended that, the respondent had failed to prove her contribution in accordance to s. 110(1) and (2) of the Evidence Act, Cap 6 R.E. 2019. He added that, the respondent had no known source of income to have acquired much of Tsh. 54,000,000/- and there was no proof on how she got paid with that loan. As there was no document from the lender as well.

He stated that, the appellant had stable job since 2006 up to 2017 as proved with Exh D1. With respect to motor vehicle with Registration No.

T.824 DLD make Toyota Noah he had the proof he owned it as per Exh. D2.

It was further argued, there was no presumption of marriage between the parties. To amplify his argument, he cited the case of **Salum Itandala v. Ngusa Sonda** [1982] TLR 33 where the court held that, to justify the parties were dully married, the court has to consider the circumstances of each case.

He added, the court was also wrong to order the appellant to maintain the respondent because they were not married. He stated the appellant could not pay the same as he was still married. The claim that the appellant had paid the bride price was refuted claiming that the sum was for legitimizing the child only.

The learned counsel for the appellant went on to state that the appellant owned the house way before he married his wedded wife as proved by PW2 and DW2 during the trial. Therefore, the trial court was wrong to find the respondent had contributed to it and ordered her to be paid Tsh. 4 million for fixing the tiles and Tsh. 1.5 for the fence.

To buttress his arguments, he cited the case of **Abdul Karim Haji v. Raymond Nchimbi Aloyce and Joseph Sitol Joseph** [2006] TLR 419 which requires he who alleges to prove.

To conclude, he prayed to this court to allow the appeal and quash the decision of the trial court with costs.

Responding to the grounds of the appeal, the respondent stated that the trial court did not error in law to declare that there was a presumed marriage between her and the appellant. She added that they had lived

together since 2016 up to 2019 at Kwa-Mrefu area and the society together with their parents considered them as Husband and wife.

She went on to state that, during their union they were working on various projects which led to the acquisition of two motor vehicles, Toyota Corolla blue colour and the other one with registration No. T.824 DCD make Toyota Noah. The evidence that was supported by PW2.

In addition to that, the respondent stated she was the working at the shop of Ngoboe, with her earning she contributed to family. She stated further she also got loans from the office. The proof of the same was said to be the bank statement of the appellant which shows at the period of their union his income increased.

She added that the appellant was working as the driver and she did not have much income. Since she was nursing their child, she trusted the appellant with their money to ran the projects. As she could not write every penny, she gave to the appellant.

The respondent stated she used to deposit money in the bank account of the appellant from 2017. Therefore, she was entitled to her contribution on those projects to the tune of Tsh. 58,300,000/- as decided by the trial court.

She added that, its true she found the appellant with the house but it was not in a good condition. She renovated the house by putting tiles, water tank, build outside toilets and put on a fence, as proved by PW2.

Also, she insisted the appellant paid the pride price Tsh. 300,000/- to her parents on 2017 as evidenced by PW2 who also participated in the process.

She concluded by praying to this court to uphold the decision of the trial court plus any other relief this court will deem fit to grant and costs of this suit.

The counsel for the appellant re-joined by maintaining his submission in chief and added that, the business claimed by the respondent was opened by him and business licence has his name. He added the respondent doesn't even know the number of the motor vehicle Corolla and she could not prove her contribution or her loan to deserve to be compensated Tsh. 58,300,000/-

He maintained that the appellant was dully married, therefore he could not pay the bride price to the respondent but he paid money to legitimize the child. He concluded maintaining their prayers to be granted.

The court having heard the rival submission of both sides, with respect to the grounds of appeal arising from it that need to be addressed by this court can be consolidated into two issues as follows;

I. Whether or not the trial court error to find there was a presumption of marriage between the appellant and the respondent.
II. Whether the trial court was justified to award the ancillary reliefs thereto.

To begin with the first issue, it is clear that the law did not intend to create another limb of marriage without parties undergoing the required rituals. However, in the circumstances where parties find themselves in an entanglement and acquire properties and children are born: Then the parties should have the law to protect them.

Marriage which is the basic unit of the family its sanctity has always been protected by legislation. However, the law also protects the couple who will unjustly be denied their rights after long cohabitation.

In those circumstances, in order to protect such kind of union, under s. 160(1) the Law of Marriage Act (LMA) Cap 29 R.E 2019, it provides that where it is proved that a couple has cohabited as husband and wife for at least two years, there shall be a rebuttable presumption that the two are married. The said provision states as follows;

> "*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.*"

Further to that, where such presumption is rebutted, the woman shall be entitled to apply to the court for an order of maintenance and other reliefs for herself and any children of the union. The same is provided under Section 160 (2) of LMA as such;

> "*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."

In the present matter, according to the submissions of the parties, the respondent claimed to have been cohabiting with the appellant from the period from 2016 to 2019. Whereas the appellant stated that they cohabited from 2017 when the daughter Clarisa was born to the time the petition was preferred.

The records of the trial court clearly show that, the respondent instituted the matter on 13th November, 2018 and stated they started to live with the appellant from 2015 up to 2018 when she filed for petition after the appellant had deserted her.

Therefore, the union of the parties was either between 2015-2018 or 2017-2018 as the case may be. One common fact was that, the parties agree that they never got married, but were blessed with one issue.

The appellant admitted to have cohabited with the respondent for some time, but he denied to have paid a bride price to legalize their affair because he was married to Hansila Charles whom they celebrated a Christian marriage on 9/12/2007 and they were not divorced.

The respondent claims to have been cohabited with the appellant for more that two years and lived together under one roof with him: Also, their

families and society had considered them a wife and husband, therefore there was the presumed marriage.

The appellant doesn't see there was the presumption of marriage because he was still married under Christian rites.

The Laws of the country recognises the Christian marriage as a monogamous union, a relationship with one partner. The same is provided under Section 9 (2) of the LMA that:

> *"A monogamous marriage is a union between one man and one woman to the exclusion of all others."*

This was emphasized in the case of **Francis Leo v. Paschal Simon Maganga** (1978) LRT 22, by his Lordship, Hon. Mfalila, J (as he then was) 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"*

The point was emphasized in the case Of **Yohane Amani Lyewe V. Theodory Mwaya**, Civil Appeal No. 22 of 2017 (Unreported), that:

> *"The law is clear that no man, while married in a monogamous marriage, shall contract another marriage see section 15 (1) of the Act. Under the circumstances, presumption of marriage under section 160 of the Act - cannot stand."*

The appellant had argued that, the marriage certificate (exhibit D3) did prove the same. Even the records of the trial court on Page 18 of the judgment reads:

"It is unfortunate the respondent did hide the petitioner that he had a Christian Marriage which was still subsisting, he still continued to go and pay bride price to the petitioner's parents, and he provide a matrimonial home and made her to believe that the respondent was his husband while not."

It is clear the trial court was aware of the subsisting marriage of the appellant. The trial court still decided to invoke Section 160 (2) of LMA despite of the monogamous marriage which is subsisting on the appellant.

The decision of the trial court contravenes with the provision of the law. I am persuaded with the decision of my fellow sister Mnyukwa J, in the case of **Agnes Adams v. Erick John Shewiyo**, (PC Civil Appeal 34 of 2021) [2021] TZHC 6772 (29 October 2021); (Tanzlii) with the similar situation the court held that:

"I am settled my mind that this Court should not accept the plea of being unaware of the status of marriage of a man so as to be covered under the umbrella of the presumption of marriage because if the same will be allowed it will defeat the spirit of section 9 of the Law of Marriage Act, Cap 29 R.E 2019 and will victimize the good purpose of section 160 of the Law of Marriage Act, Cap 29 R.E 2019 gfrom a serious misconception and misinterpretation."

Therefore, guided with the cited authorities and the provisions of the law above, this court is of the firm view that, the trial court erred in law to make a finding that there was a presumed marriage between the appellant and the respondent while the Christian marriage between the appellant and Hansila Charles was still subsisting.

Turning to the second and last issue to determine if the court was justified to award the ancillary reliefs. As determined in the first issue, the parties in this matter had no capacity to enter into marriage. If the court cannot impute the presumption of marriage, therefore the parties cannot benefit with reliefs accrued from it. Similar position was stated by this court in the case of **Anthony Isdori Ndongo v. Tundondeghe Nasoni Mwakifuna,** Matrimonial Appeal No. 10 of 2020, High Court at Mbeya (unreported) where the court held that;

> *When the court is satisfied that the parties had no capacity to marry, the presumption of marriage cannot stand in their favour...it does not matter how long the parties have lived together.*

In the case of **Anthony Isdori Ndongo (supra)** the court quoting with approval the case of **Kalala & Halima Yusuph v. Restituta Celestine Kilala** [1981] TLR 76 it was held that, when the presumption of marriage cannot be invoked issuing order for division of assets is illegal.

In the present matter, having found that there was no rebuttable presumption between the parties, the court cannot proceed to make any ancillary orders thereto. The respondent may wish to pursue other civil channel to pursue her claim on the properties claimed to have been acquired jointly during the entanglement. For the maintenance of their child, she may pursue her rights in a juvenile court.

That being said and done, I allow the appeal. Consequently, the proceedings, judgment and order of the lower court are hereby quashed and set aside for being nullity for the reasons stated above. With the nature of the matter, I order no costs to the appeal.

It is so ordered.

DATED at **ARUSHA** this 6th day of October, 2022

G.N. BARTHY

JUDGE

06/10/2022

Delivered in the presence of the appellant herself and Mr. Godfrey Salo holding brief of Mr. Peter Goodluck for the appellant