IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. MATRIMONIAL APPEAL No. 05 OF 2021

(Arising from matrimonial Appeal No. 25 of 2020 from Kahama District Court. Originating from P/C Matrimonial cause No. 57 of 2020 of Kahama Primary Court)

BERTHA MAGANGA MASANJA.....APPELLANT

VERSUS

KUSUNDWA KIKULI MAGAYI.....RESPONDENT

JUDGMENT

05th & 27th May 2022

MKWIZU, J:

The appellant Bertha Maganga Masanja did at the primary Court of Kahama petition for divorce and distribution of matrimonial property acquired during the substance of their marriage. The Primary court did not grant both prayers. It instead endorsed the respondents request to maintain the appellant who was by then staying at the respondent's house

Dissatisfied, appellant appealed to the district court faulting the trial court for denying her divorce decree, forcing parties to live together despite the fact that there are sufficient evidence that their marriage has broken down beyond repair. The 1st appellate Court found that parties lived together from 1969 to 1992 for a period of 23 years cohabiting under presumption of marriage under section 160 of the Law of Marriage Act but failed to grant the division of Matrimonial assets prayer for failure by the

appellant to establish by evidence asserts termed matrimonial which could be subjected to division.

Appellant is again aggrieved; she has approached this appeal on the following grounds that:

1. The after deciding that the appellant and the respondent were living under presumption of law, the learned Resident Magistrate erred both in law and facts when denied the appellant the division of joint matrimonial properties.
2. That, the learned Resident Magistrate erred in law and facts in his verdict that there is no evidence brought before the trial court to justify the existence of matrimonial asserts, whilst the appellant testified before the trial court that, she is entitled to division of matrimonial assets, to wit two houses located at Kahama Township, herds of cattle, piece of shamba and four plots of Land located at Kisuke Village.
3. That learned Resident Magistrate erred both in law and facts in not considering that, the appellant's evidence of matrimonial properties was not disputed by the respondent, hence the appellant was entitled to division of the said matrimonial asserts which were acquired jointly before she left the respondent.

When the appeal was called on for hearing both, the appellant and respondent appeared in person unrepresented. Appellant prayer was for the court to consider her grounds of appeal and order division of matrimonial asserts. The respondent submissions were in the opposite. He

blamed the appellant for leaving the matrimonial home since 1992 getting married and claiming to have distributed the properties to his children insisting that he has nothing to give the appellant.

It is evident from the trial court records that the issue whether the parties herein were married or not was not contentious. It is clear that appellant and respondent lived as a husband and wife for 23 years from 1969 and were blessed with five (5) children before sometimes in 1992 when appellant left the matrimonial home and moved to her parents' home.

Appellants evidence on this point reads:

> *"mimi na mdaiwa tuliona mwaka 1969. Tumeishi wote miaka 23 mimi nilikuwa mke wake wa pili. Tulizaa naye Watoto watano ambao wapo hai hadi sasa tuliachana mwaka 1992..."*

And Respondent was recorded to have said:

> *"...mdai yupo kwangu yeye aliniacha na alienda kuolewa na alizaa huko na mtoto alifariki ndipo aliamua kurudi kwenye mji wangu anaishi hapo mimi nilikuwa na wanawake sana na waliniacha ni wanne pamoja na mdai....tumeishi wote miaka 23, mdai ni mke wa pili."*

Section 160 of the Law of Marriage Act deals with a presumption of marriage. The provision says:

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 married.

The above section was interpreted in **John Kirakwe Vs Iddi Siko** [1989] TLR 215 where three elements constituting presumption of marriage were established thus:

i. That the parties have cohabited for more than two years,

ii. That the parties have acquired the reputation of husband and wife, and

iii. That there was no formal marriage ceremony between the said couple.

The first appellate court was correct, based on the above evidence and law to conclude that parties were living under a presumption of marriage.

The issue for this court's determination is whether the parties under such a marriage are entitled to division of matrimonial assets. The answer to this pertinent question is obtained from section 160 (2) of the Law of Marriage Act [CAP. 29 R.E. 2019] which stipulate:

"(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"*

The above section was emphasize in the case of **Hemed S.Tamim Vs Renata Mashayo** [1994] TLR 197 where it was held:

"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 s 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_"*** *(emphasis supplied)*

Gleaned from the above position of the law is that parties under the presumption of marriage are eligible for the reliefs including division of properties acquired by their joint's efforts during the subsisting of their union.

The rules for ordering the division of matrimonial assets are explained under section 114(2) (b) of the Law of Marriage Act, which demand the extent of the contributions made by each party in money, property, or work towards the acquisation of the assets to be considered by the court. This was emphasized in the case of **Yesse Mrisho vs Sania Abdul,** Civil Appeal No. 147 of 2016 CAT (unreported) where the court said:

> *"Section 114 of the LMA provides for division of properties acquired by parties by their efforts during the pendency of matrimony, and it requires the courts, when considering this issue,* ***to ensure that the extent of contribution of each party is the prime factor.*** *The assets to be determined are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.* "(emphasis added)

The focus by this court will therefore be on whether there are matrimonial properties acquired by the parties during their cohabitation and the status of each party's contribution before going to actual division if need be.

Appellants evidence on the matrimonial assert's aspect of her petition before the trial court was brief. She said:

> *"Mimi kwa kuwa tulishaachana mimi naomba na mimi anipe nyumba mbili ziko hapo mjini Kahama, ng'ombe zipo sijui idadi mimi niliacha ng'ombe mia mbili. Mashamba yapo Kisike na ploti nne kisuke Mimi nataka mimi nipewe vitu hivyo nilivyovitaja, vingine mimi namwachia ale na wake zake hizo. Mimi siataki zaidi..."*

As rightly observed by the 1st appellate court, the appellant was married in 1969 as a second wife. They cohabited for about 23 years before they separated in 1992 when appellant left the matrimonial home for 15 years before she returned to the respondent in 2007. It is also undisputed that respondent had other several wives in between. In such a situation, the appellant was expected to list the properties acquired during the subsistence of their union and testify on extent of her contribution towards their acquisition. Apart from naming them in her evidence, no tangible evidence was further adduced on **when** and **how** the said properties were acquired by the parties. This is also crucial in this case because, the parties have been separated for over 15 years from 1992 before return of the appellant in 2007 who is according to the records residing at the respondent's house since then.

Like the 1st appellate court, I am satisfied that, the division could only be possible upon proof of existence of matrimonial properties by the parties and contribution of each party on their acquisition which is lacking in this

case. This appeal is therefore without merit. It is dismissed on its entirety. Given the relationship of the parties and their age, I give no order as to costs. It is so ordered.

DATED at **Shinyanga** this 27th day of **May** 2020.

E.Y MKWIZU, J.

27/5/2022

Court: Right of appeal explained

E.Y. MKWIZU
JUDGE
27/5/2022