IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MATRIMONIAL APPEAL NO. 06 OF 2022

(Originating from Matrimonial Cause No. 1 of 2021 of Rombo District Court at Mkuu).

MONICA SERAFINI .....APPELLANT

VERSUS

RICHARD C. SILAYO..... RESPONDENT

JUDGMENT

12/10/2022 & 14/11/2022

SIMFUKWE, J.

The appellant Monica Serafini petitioned before the district court of Rombo for judgment, decree and orders inter alia that:

a. *A declaration that a presumption of marriage between the appellant and the respondent existed as they had lived together as husband and wife.*
b. *Ancillary to the grant of the prayer in paragraph (a) above, for orders that the marriage between the petitioner and the respondent is broken down irreparably.*
c. *Dissolution of marriage and decree of divorce be issued by the court.*
d. *Custody of the issues of marriage be under the petitioner.*

e. *Division of matrimonial assets*

f. *An order that the respondent is duty bound for maintenance of the issues of the marriage.*

The first prayer was answered in the negative, hence affecting the second and third prayers of finding the marriage between the appellant and the respondent broken down irreparably and dissolving it. The prayer of division of matrimonial assets was also declined; while custody of children was granted to the appellant and the respondent was ordered to maintain his three children at a tune of Tshs 200,000/ per month.

It seems that the appellant was not happy with the decision of the trial court. She preferred the instant appeal on the following grounds:

1. *That the trial court erred in law and fact by not ascertaining and or considering that there was presumption of marriage between parties and further that the parties can no longer live together as husband and wife regardless of evidence/proof by the Appellant before it.*
2. *That the trial court erred in law and fact by not making an order of division of the jointly acquired matrimonial property between the parties.*
3. *That the trial court erred in law and fact by declaring that the assets were not matrimonial properties.*
4. *That the decision of the trial court lacks legal reasoning.*

The appellant prayed that her appeal be allowed with costs.

In the course of hearing this appeal, the appellant had no legal representation while the respondent enjoyed the service of the learned

counsel Mr. Julius Focus. The appellant prayed to argue the appeal by way of written submission and her prayer was granted.

On the 1st ground of appeal, the appellant referred to **section 160 (1) of the Law of marriage Act, Cap 29 R.E 2019** which provides that:

> *"Where it is proved that a man and a 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 appellant submitted that the purpose of the above section is to protect and recognize long established cohabitation. That, in other words, if an allegation of presumption of marriage is raised and conditions as set in **section 160 (2) of the Law of Marriage Act** are satisfied, the Court must give judicial notice to the existence of marriage. She stated that the stringent requirement set up by the law is to the effect that one who alleges as to the existence of a certain fact bears the responsibility of actually proving it as the spirit of **section 110 of Cap 6 R.E 2019**. That, like in all other civil cases, the appellant's burden of proving existence of what she alleged is on balance of probabilities of which in this case was less on the respondent's side.

It was cemented that the appellant and all her witnesses who were neighbours testified to have been aware of the relationship between the parties as that of husband and wife. That, the appellant testified to have been living with the respondent for 17 years since 2004 up to 2017. PW2 testified to have been working together with the respondent until when the respondent was recruited by another employer. PW3 testified to have been living nearby the partied since 2004 and that he was aware of their

relationship being that of a husband and wife. PW4 also testified to have been working for PW1 and identified DW1 as her husband. PW5 also testified to have known the parties living together as husband and wife for more than 2 years.

The appellant alleged that it is clear that evidence was on her side contrary to witnesses who testified in favour of the respondent majority of whom were witnesses who did not know the background of the parties' relationship. Majority testified to have known the respondent from the year 2018 when the respondent had already left the appellant and married another woman. That, it was under such circumstances that led the appellant to petition to the trial court seeking orders that the parties can no longer live together as husband and wife among others.

It was submitted further that be as it may, the judgment of the trial court seems to be biased on what is meant by the term "living together." That, it is undeniably that the trial court translated that living together is sleeping under one roof on each single day. That, the court failed even to take judicial notice on the nature and job of the respondent who is a driver and businessman. The appellant was of the view that such translation is totally misconceived for people do not stop working just to sleep under one roof everyday depending on the nature of the respondent's job. That, in fact no interruption was proved in court for the last 17 years of the parties' cohabitation.

It was thus submitted that the trial court grossly erred in not declaring that a presumption of marriage between parties existed. The appellant prayed this court to declare that presumption of marriage existed and due

to the respondent's marrying another woman, the court should also declare that the parties can no longer live together as husband and wife.

On the 2nd and 3rd grounds of appeal which concerns failure to declare that the assets were matrimonial assets, it was contended that, during the trial the appellant claimed that they had 10 plots and she was the one supervising activities on those plots. The money which they earned was used to pay school fees and that in 2015 they bought a motor vehicle with registration number T. 618 AKA make Fuso, they bought a plot at Kibosho and built a house on it and a wooden house at Msangai village. That, the respondent admitted that in 2006 he started cultivating and that since most of the time he was on safari, he used to send money to the appellant for children' needs and paying laborers working on the plots. Crops harvested were sold and the money was deposited in the bank account and some of the money was used to buy land at Mbomai village and built a house of three bedrooms. He also built a house for commercial purposes. That, a house located at Msangai is a family house. The appellant was of the opinion that the trial court disregarded such evidence on existence of matrimonial assets on the reason that none of the parties produced any evidence pertaining to their contention regardless that they were admitted by both parties.

In support of the 2nd and 3rd grounds of appeal, the appellant cited the case of **Pauline Samson Ndawavya v. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017**, CAT (unreported) in which it was held that:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the*

evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case." Emphasis is underlined.

The appellant commented that requiring evidence in such a matter admitted by both parties is like proving the matter beyond reasonable doubt as in criminal matters.

The appellant submitted further that the respondent is not prejudiced anyhow by the division of the properties jointly acquired as he admitted to had acquired the properties jointly with the appellant. She referred to page 7 of the typed judgment of the trial court.

On the last ground of appeal, the appellant submitted that the trial court's judgment lacks legal reasoning in that the duty of the court is to measure the weight of evidence adduced by both parties together with their witnesses, tests its credibility prior to composing a verdict in the contested facts in issue. Insisting the argument, reference was made to the case of **Stanslaus R. Kasusura and A.G vs Phares Kabuye [1982] TLR 338,** in which it was held that:

"The trial judge should have evaluated the evidence of each of the witness, assessed their credibility and made a finding on the contested fact in issue."

It was concluded that the trial court's judgment lacks legal reasoning since the trial Magistrate failed to analyse the evidence adduced. That, no credible reasons were given to justify the decision reached. The appellant prayed that the decision of the trial court should be set aside and allow this appeal with costs.

In reply, the learned advocate for the respondent argued that at the trial court it was not disputed that there was a child by the name Victor Solomon who is not the respondent's child. Also, it was undisputed fact that there was marriage contracted by the respondent and one Paulina and it was not disputed fact that the respondent visited the appellant on weekends only as he had been living at Moshi with legal wife which resulted to existence of other issues.

Mr. Julius continued to argue that the disputed fact is the existence of either form of marriage between the respondent and the appellant and division of matrimonial assets.

It was argued that the appellant had duty which she failed to demonstrate to the satisfaction of the court that there was a presumption of marriage as per the requirement of the law which requires the court to declare the existence of the same. That for the court to grant the appellant's prayer the compliance of **section 110 (1) of the Evidence Act Cap 6 R.E 2019** was very important since the appellant ought to prove the requirement of **section 160(1) of the Law of Marriage Act** (supra) in so far as presumption of marriage is concerned. That through the entire records of the trial court there is nowhere the appellant managed to provide evidence to the satisfaction of the court that they lived together as a husband and wife for seventeen good years.

Mr. Julius sustained that the appellant was in the same lane when she proved that the respondent only visited her for only weekends. That, the entire evidence given by both parties showed that the appellant and the respondent used to visit each other on weekends and once per month as it can be seen at page 11 of the judgment and page 9 of the typed proceedings. It was the opinion of Mr. Julius that such visits never acquired the reputation of being husband and wife as declared by the trial court. To cement his position, the learned advocate referred to page 8 and 9 of the typed proceedings, when she was cross examined the appellant said; even persons who are none-couple may have the arrangement of visiting each other.

Moreover, the respondent's advocate contended that the respondent doesn't dispute the fact that being a father to the said children born by the appellant is legally responsible to provide for them. To justify his willingness as responsible father, he built a house located at Mbomai Chini Tarakea for the appellant and her children which contains ten rooms, three are for the children and other rooms for commercial purpose in order to maintain the children. He referred to page 16 of the trial court's typed proceedings to that effect.

Further to that, it was the opinion of Mr. Julius that since the trial court declared no existence of presumption of marriage, then the second ground regarding division of matrimonial properties lacked legal basis and that's why the trial court declined to order for the same since the properties do not fall either to matrimonial assets or properties jointly acquired.

Responding to the allegations that the trial court's judgment lacks legal reasoning, it was submitted that the appellant misinterpreted the principle regarding legal reasoning. That, the judgment had legal reasoning as reflected from page 1 to 13 of the trial court's judgment where the trial court had narrated the facts, evidence, case laws and the issues and arrived at such orders.

The learned advocate prayed the court to dismiss this appeal with costs.

In her rejoinder, the appellant argued that the contention that a person who are none couple may have the arrangement of visiting each other is totally misconceived and it is not on record. She argued that what is on record at page 8 of the typed proceedings is that; it is possible for wife and husband to stay for a short period of time.

She added that the respondent is a businessman selling crops that was supervised by the appellant thus he was mostly on safari hence he could not be in the matrimonial home every day.

The appellant insisted the court to declare that the presumption of marriage existed and division of matrimonial propertied be granted as the respondent will not be prejudiced anyhow by recognizing and division of matrimonial properties.

I have given due consideration to the grounds of appeal, rival submissions from both sides and evidence on the trial court's record. I am of considered view that the issue for consideration is *whether this appeal has merit.*

Presumption of marriage is provided for under **section 160 of the Law of Marriage Act**. For ease reference the provision reads:

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.

(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."*
Emphasis added

Rebut means claim or prove that evidence or an accusation is false. Also, it means to refute, deny or disprove (Oxford Dictionary). The wording of

subsection (2) (supra), means that the woman applies for the prescribed reliefs where the relationship does not work and the man with whom she was cohabiting has rebutted the presumption as emphasized in the above quoted provision.

In this case the parties were disputing the fact that they lived as husband and wife. The trial court in so far as this issue is concerned had this to say:

> *"Basing on the evidence on record, PW1 the petitioner despite alleging that she lived with respondent for 17 years as husband and wife however told this court that respondent sometimes was living in Moshi and sometimes in Rombo, he only visited her on weekends and most of the time he was on safari, basing on that fact I am afraid if respondent's tendency of visiting petitioner only on weekends and spent most of the time on safari would have click the requirement that the parties have cohabited for two years or more..."*

With due respect to the learned trial magistrate, the logic behind having presumption of marriage is a common law principle which raises presumption that prolonged cohabitation of the parties creates a valid marriage where circumstances to the contrary do not arise. The essence of having the presumption of marriage is to avoid the party to get out of the relationship empty handed as stated in the case of **Hemed S. Tamim vs Renata Mashayo [1994] TLR 198**.

Article 13 (1) of the Constitution of the United republic of Tanzania provides that:

"All persons are equal before the law and are entitled without discrimination, to equal protection of the law."

Article 16 (1) (b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that:

"16 (1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(c) The same right and responsibilities during marriage and at its dissolution."

In the circumstances of this case the fact that the appellant and respondent had a relationship, as testified by the respondent and the appellant together with their witnesses, and that they were blessed with two issues, suffice to conclude that the two were living under presumption of marriage despite the fact that the respondent has rebutted the said presumption. In the spirit of the above quoted provisions, the appellant cannot be left empty handed which is the logic of applying the principle of presumption of marriage.

Having concluded as such, I am of considered view that the trial court misdirected itself by concluding that there was no need to divide the acquired assets while the respondent confessed in his testimony that he used to send money to the respondent for cultivation and that the respondent was supervising the farming which enabled them to build a house at Mbomai and Msangai villages as recorded at page 7 of the judgment of the trial court.

Coming to the second ground of appeal on division of matrimonial properties; the trial court was of the opinion that since the issue of presumption of marriage was rebutted, there was nothing to resolve and equally the question of division of matrimonial property does not arise.

In the case of **Hemed S. Tamim** (supra) the Court of Appeal held that:

> ***i.*** *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 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.***
>
> *ii. Having found that the parties were not duly married, the decision of the lower court regarding the dissolution of marriage is void." Emphasis supplied*

In the instant matter, since it is not disputed that the appellant and the respondent had a relationship and they were blessed with two issues, then division of the properties which were acquired during their relationship was inevitable. The respondent has not disputed the fact that he was sending money to the appellant for cultivation and that the appellant was supervising the farming as stated herein above. Properties listed by the appellant includes: one house at Kibosho road in Moshi Municipality, one house at Msangai village (family house) and one house at Mbomai village (for commercial purposes). In the case of **Tamimu S. Mashayo** (supra) at page 198 last paragraph the Court of Appeal stated that:

"The respondent was therefore as it were condemned to get out of the eight years relationship with the appellant empty ended. She fought back and successfully appealed to the High Court where Bahati, J ***held that although the presumption under s. 160 (1) of the Law of Marriage Act had been rebutted, the respondent still had some residual rights to property under s. 160(2) of the Act*** *which empowers the court, upon rebuttal under ss(1) of the same and upon the woman satisfying the court (as she did in this case) that she and the man did in fact live together as husband and wife for two years or more."* Emphasis added

The scenario in this case is similar with the scenario of the above cited case. On that basis, having considered submissions and evidence of both parties, I find it justifiable that a house at Mbomai be distributed to the appellant, a house at Msangai the home village of the respondent, be distributed to the respondent and concerning a house at Kibosho road, the respondent should pay the appellant 30% of the value of the house after an official evaluation is done. Since the issue of the motor vehicle is not certain I make no order in respect of it.

I do not disturb the findings in respect of custody and maintenance of the issues as I find it reasonable and justifiable.

Appeal allowed with costs.

It is so ordered.

Dated and delivered at Moshi this 14th day of November 2022.

S. H. Simfukwe

judge